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Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1988

STATE OF MAINE, COMMONWEALTH OF PENNSYLVANIA, STATE OF CONNECTICUT, STATE OF VERMONT, STATE OF NEW HAMPSHIRE, STATE OF NEW JERSEY, and RICHARD L. OTTINGER,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and LEE THOMAS, Administrator, CINCINNATI GAS & ELECTRIC COMPANY, et al., MONONGAHELA POWER COMPANY, NORTH AMERICAN COAL CORPORATION, et al., PEABODY HOLDING COMPANY, INC., et al., TENNESSEE VALLEY AUTHORITY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

Since 1970, § 110 of the Clean Air Act has listed eleven requirements for EPA approval of the State Implementation Plans (SIPs) by which the Act's national clean air goals are to be achieved. In 1977 a new requirement addressing interstate air pollution was adopted, and an administrative petition procedure was created to enforce the terms of the new requirement.

The questions presented are:

1. By enactment of the new interstate air pollution requirement, did Congress implicitly direct EPA to review previously approved SIPs under the new requirement?

2. When no such review has been conducted, is review of previously approved SIPs at least required for a specific case of interstate air pollution raised by administrative petition?

3. If a state suffers from interstate visibility impairment as defined by law, is the state's right to relief by petition to EPA nullified by EPA's failure to establish the required national regulatory program for visibility?

PARTIES TO THE PROCEEDING

This case challenges final action of the Administrator of the United States Environmental Protection Agency under § 126(b) of the Clean Air Act on petitions concerning interstate air pollution. 42 U.S.C. § 7426(b). The States of New York, Maine, Connecticut, Vermont, New Hampshire and New Jersey, the Commonwealth of Massachusetts, and Richard L. Ottinger were petitioners in No. 84-1592. The Commonwealth of Pennsylvania and the States of New York and Maine were petitioners in No. 85-1082. The United States Environmental Protection Agency and its Administrator, then William Ruckelshaus, were respondents in both proceedings. The cases were consolidated on March 11, 1985.

Intervening below on behalf of respondents were Cincinnati Gas & Electric Company, Ohio Power Company, Ohio Edison Company, Ohio Valley Electric Corporation, Columbus & Southern Ohio Electric Company, Commonwealth Edison Company, Illinois Power Company, Indiana-Kentucky Electric Corporation, Indiana & Michigan Electric Company, Southern Indiana Gas & Electric Company, Indianapolis Power & Light Company, Consumers Power Company, Toledo Edison Company, The Cincinnati Gas & Electric Company, Monongahela Power Company, North American Coal Corporation, The NACCO Mining Company, Peabody Holding Company, Inc., Peabody Coal Company and Tennessee Valley Authority.

Pursuant to Rule 19.6 of this Court, all petitioners, respondents and respondent-intervenors below other than Petitioners here are Respondents in this Court.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The States of Maine, Pennsylvania, Connecticut, Vermont, New Hampshire and New Jersey and Richard L. Ottinger petition for a Writ of Certiorari to review a decision of the United States Court of Appeals for the District of Columbia Circuit in Case Nos. 84-1592 and 85-1082.

OPINION BELOW

The Opinion of the Court of Appeals is reported at 852 F.2d 574 (D.C. Cir. 1988), and is reprinted in the Appendix, *infra*, at A-1 to A-17. In substance, the Court's decision affirms the final action of the Administrator of the U. S. Environmental Protection Agency published at 49 Fed.Reg. 48152 (Dec. 10, 1984), reprinted in the Appendix, *infra*, at B-1 to B-25.

JURISDICTION

The judgment of the Court of Appeals was entered on July 22, 1988. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 7410(a) (2) The Administrator shall, within four months after the date required for submission of a plan under paragraph (1), approve or

disapprove such plan for each portion thereof. The Administrator shall approve such plan, or any portion thereof, if he determines that it was adopted after reasonable notice and hearing and that–

* * *

(E) it contains adequate provisions (i) prohibiting any stationary source within the State from emitting any air pollutant in amounts which will (I) prevent attainment or maintenance by any other State of any such national primary or secondary ambient air quality standard, or (II) interfere with measures required to be included in the applicable implementation plan for any other State under part C to prevent significant deterioration of air quality or to protect visibility, and (ii) insuring compliance with the requirements of section 126, relating to interstate pollution abatement;

* * *

(3)(A) The Administrator shall approve revision of any implementation plan applicable to an air quality control region if he determines that it meets the requirements of paragraph (2) and has been adopted by the State after reasonable notice and public hearings.

42 U.S.C. § 7426(b) Any State or political subdivision may petition the Administrator for a finding that any major source emits or would emit any air pollutant in violation of the prohibition of Section 110(a)(2)(E)(i). Within 60 days after receipt of any petition under this subsection and after public hearing, the Administrator shall make such a finding or deny the petition.

42 U.S.C. § 7491(a)(1) Congress hereby declares as a national goal the prevention of any future, and the remedying of any existing, impairment of visibility in mandatory class I Federal areas which impairment results from manmade air pollution.

* * *

(4) Not later than twenty-four months after the date of enactment of this section, and after notice and public hearing, the Administrator shall promulgate regulations to assure (A) reasonable progress toward meeting the national goal specified in paragraph (1), and (B) compliance with the requirements of this section.

(b) Regulations under subsection (a)(4) shall–

(1) provide guidelines to the States, taking into account the recommendations under subsection (a) (3) on appropriate techniques and methods for implementing this section (as provided in subparagraphs (A) through (C) of such subsection (a) (3)), and

(2) require each applicable implementation plan for a State in which any area listed by the Administrator under subsection (a)(2) is located (or for a State the emissions from which may reasonably be anticipated to cause or contribute to any impairment of visibility in any such area) to contain such emission limits, schedules of compliance and other measures as may be necessary to make reasonable progress toward meeting the national goal specified in subsection (a), including–

* * *

STATEMENT OF THE CASE

The petitioners are northeastern States which claim a right to federal protection from excessive air pollution transported into their jurisdictions from upwind states – a claim arising from amendments to the Clean Air Act, 42 U.S.C. § 7401, *et seq.*, that were enacted in 1977.

The 1977 Interstate Pollution Amendments

The Clean Air Act of 1970 established a Federal/State partnership which recognizes that "the prevention and control of air pollution at its source is the primary responsibility of States and local governments." Section 101(a)(3), 42 U.S.C. § 1857(a)(3) (1976) and 42 U.S.C. § 7401(a)(3). However, the federal Environmental Protection Agency ("EPA") was directed to establish a national program for air pollution control, including the establishment of primary and secondary national ambient air quality standards ("NAAQS") designed to protect the public health and welfare, and other national measures limiting air pollution. Each state was required to adopt a plan, known as the State Implementation Plan ("SIP"), to achieve the national air quality goals.

Assurance that each SIP is adequate to attain the national air quality goals is achieved through approval of each plan by EPA, applying criteria enumerated in § 110(a)(2), formerly 42 U.S.C. § 1857c-5(a)(2)(A)-(H) (1976). In the 1970 Act, the only provision addressing the extraterritorial effect of any state's air pollution emissions was a requirement that the Administrator determine that:

> (E) [The SIP] contains adequate provisions for intergovernmental cooperation, including measures necessary to ensure that emissions of air pollutants from sources located in any air quality control region will not interfere with the attainment or maintenance of such primary or secondary [National Ambient Air Quality] standard in any portion of such region outside of such State or in any other air quality control regions.

42 U.S.C. § 1857c-5(a)(2)(E) (1976). EPA interpreted this provision as necessitating only an information exchange among the states. 40 CFR § 51.21(c) (1972). This limited reading was upheld in the *Natural Resources Defense Council v. EPA*, 483 F.2d 690, 692-93 (8th Cir. 1973).

However, Congress became aware that achieving the national air quality goals could well be frustrated by the cumulative effect and the interstate movement of air pollution emissions.[1]

Congress further concluded that the 1970 Act, as construed by EPA, offered no effective mechanism to prevent or abate interstate air pollution, and so amended it in 1977. House Report, 329-330, 1408-1409. The former interstate pollution provision was repealed and replaced by the current provision, making federal approval contingent upon a finding that:

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[1] The House Report accompanying the 1977 amendments to the Clean Air Act notes that "air pollution now is known to travel long distances, borne by moving air masses." H.R. Rep. No. 294, 95th Cong., 1st Sess. 135, *reprinted in* 1977 U. S. Code Cong. & Admin. News 1077, 1214, (hereinafter "House Report [Report page], [U.S.C.C.A.N. page]"). The House Report concluded that "while emissions may not be 'significant' in the area of origin, when transported to another area and combined with pollutants from other areas, air quality may be drastically degraded." *Id.* Such effects have been amply documented in the Administrative Record compiled in this proceeding before EPA. *See e.g.*, National Academy of Sciences, "Atmosphere Biosphere Interactions: Toward the Better Understanding of the Ecological Consequences of Fossil Fuel Combustion," 1981, Certified Index to the Docket No. A-II-19; Congressional Office of Technology Assessment, "Acid Rain and Transported Air Pollutants," June, 1984, No. D-IV-7.

> (E) [The SIP] contains adequate provisions (i) prohibiting any stationary source within the State from emitting any air pollutant in amounts which will (I) prevent attainment or maintenance by any other State of any such national primary or secondary ambient air quality standard, or (II) interfere with measures required to be included in the implicable implementation plan for any other State under Part C to prevent significant deterioration of air quality or to protect visibility and (ii) ensuring compliance with the requirements of Section 126, relating to interstate pollution abatement [.]

42 U.S.C. § 7410(a)(2)(E).

At the same time, a special administrative remedy was created for states and political subdivisions aggrieved by interstate air pollution. Section 126(b) was enacted to provide an administrative proceeding whereby states could petition EPA "for a finding that any major source emits or would emit any air pollutant in violation of the prohibition of section 110(a)(2)(E)(i)." 42 U.S.C. § 7426(b). In construing this provision, "EPA agrees . . . that Section 126 may be applied to cumulative impacts of sources that are sufficiently identified." 49 Fed.Reg. 34858, n. 50 (Proposed decision of interstate petitions below, Sept. 4, 1984). This interpretation was unchanged by the agency's final decision below: " . . . the adequacy of a SIP is precisely the issue in question in Section 126 petitions." 49 Fed.Reg. 48156 (December 10, 1984), App. B-19. In spite of these views, EPA has never looked at the adequacy of any SIP under the new interstate requirement.

The States' Petitions to EPA

In 1980 and 1981, the States of Pennsylvania, New York and Maine filed petitions with EPA under Section

126(b) requesting EPA to find that sulfur dioxide (SO_2) emissions from stationary sources in upwind states were causing interstate air pollution prohibited by § 110(a)(2)(E) of the Act. Each petition documents specific harm within the petitioning state, and each petition traces that harm to SO_2 emissions sanctioned by SIPs that were approved by EPA before the 1977 enactment of the new interstate air pollution requirement. The petitions requested EPA to determine whether the SIPs of seven upwind states satisfied the revised interstate requirement of § 110(a)(2)(E). A hearing was held on the consolidated petitions, and the administrative record was closed in May, 1982 after an 11-month period for public comment.

EPA took no action on the petitions until ordered to do so by the United States District Court for the District of Columbia. *New York, et al. v. Ruckelshaus* (D.D.C. No. 84-0853) 21 Env. Rptr. Cases [BNA] 1721 (1984). In response to the court's order, EPA denied the states' petitions. It did so, however, without considering the adequacy of the SIPs of the upwind states identified by the petitions, maintaining that the agency was under no obligation to do so. App. B-11, 12; B-24. On review, the Court of Appeals for the District of Columbia Circuit upheld EPA's construction of the interstate provisions incorporated in the Clean Air Act in 1977, and the denial of the state petitions that resulted. App. A-8.[2]

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[2] The Circuit Court remanded New York's petition to EPA for reconsideration in light of the revised NAAQS for airborne particles adopted by the agency during the pendancy of the litigation below. However, New York remains a party to this action, and the construction of the interstate provisions of the Act is obviously critical to further proceedings before the agency.

REASONS FOR GRANTING THE WRIT

If EPA's construction of the interstate provisions of the Clean Air Act is upheld, downwind states have no effective remedy when interstate air pollution prevents their achieving national clean air goals, contrary to the express intention of Congress.

This case involves the single largest and best documented case of transboundry air pollution occurring within the United States. As a result of the extraordinary quantity of sulfur dioxide emissions from the industrial midwestern states, the northeastern region is periodically blanketed by heavily polluted weather systems characterized by very high ambient sulfate levels, regional haze and acid rain.[3] In denying the administrative petitions, EPA adopted a construction of the Clean Air Act that effectively precludes any abatement of existing interstate air pollution.

The legal theory of these petitions is straightforward: (1) the petitioning states are entitled to protection against impermissible interstate pollution through EPA review of the SIPs of upwind states under § 110(a)(2)(E); (2) no such review has ever been performed; and (3) under those circumstances, a § 126(b) petition addressing a particular claim of interstate pollution triggers an EPA duty to determine the adequacy of the SIPs of the upwind states with respect to that pollution. The particular means chosen by Congress to address the problem and the

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[3] *See* record citations in n. 1, supra. *See also Cleveland Electric Illuminating Co. v. EPA*, 572 F.2d 1150, 1153-57 (6th Cir. 1958).

express congressional intent to establish an effective remedial mechanism support this view.

From the face of the statute alone, Congress plainly chose to remedy the problem of interstate air pollution through the preexisting SIP submission and approval process of § 110.[4] It is clear that EPA felt no obligation to evaluate the interstate effects of the midwestern SIPs, or any SIP. With respect to the existing pollution covered by midwestern SIPs already approved, the new § 110(a)(2)(E) would only have been applied if a state voluntarily resubmitted its entire SIP for review. EPA's reliance on that course violates two of the five "basic" elements of the new program articulated by the House Committee:

> . . . an effective interstate air pollution control program must include not only prevention of interstate air pollution from new sources but also abatement of pollution from existing sources.
>
> * * *
>
> . . . an effective program must not rely on prevention or abatement action by the State in which the source of the pollution is located.

House Report, at 330, 1409.

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[4] In so doing, Congress was no doubt aware of § 110(c), which requires EPA to step in and promulgate any necessary SIP measures whenever a state "fails to submit an implementation plan that meets the requirements of this section[.]" 42 U.S.C. § 7410(c).

The legislative history of the 1977 Amendments shows that Congress did *not* intend EPA to be passive concerning the states' compliance with the several criteria of § 110(a)(2). Congress recognized in 1977 that the "existing law (as interpreted by the Administrator) is an inadequate answer to the problem of interstate air pollution." House Report at 329-330, 1408-1409. Particularly inadequate was the Administrator's reliance on the voluntary action of the states to initiate control of their own air pollution emissions. House Report at 330, 1409. As the Court below noted in a prior case:

> [A] federalist policy of deferring to a state concerning its internal growth management is inadequate to control the problems of interstate pollution abatement. For this the statute provides special mechanisms [including Sections 110 and 126].

Alabama Power Co. v. Costle, 606 F.2d 1068, 1084 (D.C. Cir. 1979). *Accord, Alabama Power Co. v. Costle*, 636 F.2d 323, 366-67 (D.C. Cir. 1979). It was precisely Congress' concern over the adequacy of existing, approved SIPs that led to the new provisions. The 1977 Amendments were designed to make it possible for the states harmed by interstate air pollution to achieve abatement by enforcing the federal SIP oversight process. If the amendment of § 110(a)(2)(E) does not alone compel SIP review and revisions where necessary, a proper petition under § 126(b) must plainly trigger that obligation.

Section 126(b) exists only to enable the downwind victims of interstate pollution to enforce the new substantive standard established in § 110(a)(2)(E). Yet in responding to the petitions below, after having had them

under consideration for more than three years, EPA made no effort to test the sufficiency of any SIP under § 110(a)(2)(E) with respect to the single pollutant that is the focus of the petitions.[5] If neither § 110(a)(2)(E) nor a § 126(b) petition requires EPA to make a determination of the adequacy of the upwind SIPs, then there will be no abatement of interstate pollution from existing sources. The remedial mechanism established by Congress in enacting these dual provisions is defeated.

EPA contends that it has no legal obligation to determine the sufficiency of state plans with respect to existing interstate pollution, either by the adoption of § 110(a)(2)(E) or in a specific case by a state's submission of a § 126 petition. In the language of the Court below:

> The Administrator's review of various SIP revisions submitted by states is an ongoing process, and under the Administrator's interpretation the prohibition of § 110(a)(2)(E) is one of the requirements that must be met before he can approve any initial SIP or revision.

App. A-12. Under that view, the real problem is never confronted. The "initial" SIPs were approved before 1977,

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[5] In fact, these petitions appear to have caused EPA to change its view of the analysis required by a § 126 petition. In this proceeding, in contrast to its handling of the few prior petitions filed under Section 126(b) (*see Air Pollution Control District of Jefferson County, Kentucky v. EPA*, 739 F.2d 1071, 1077-79 (6th Cir. 1984); *Connecticut v. EPA*, 696 F.2d 147, 153-54 (2nd Cir. 1982)), EPA did not make any evaluation of the extent of interstate pollution actually occurring or likely to be occurring, given the sulfur dioxide emissions already authorized by the midwestern SIPs then in effect.

and have not been reviewed since the 1977 Amendments. In reviewing subsequent SIP revisions, EPA has carefully limited the scope of its review to only those emissions that are increased. Review of the combined effect of increased emissions and existing emissions is steadfastly refused. *New York v. EPA*, 710 F.2d 1200 (6th Cir. 1983); *New York v. EPA*, 716 F.2d 440 (7th Cir. 1983).

As EPA's dismissal of Maine's visibility petition demonstrates, the agency also believes that it can avoid applying the interstate pollution prohibition to the dominant form of eastern visibility impairment – regional haze – by indefinitely postponing any national regulation of the problem. 49 Fed.Reg. 48154; App. B-10, 11. EPA takes this view notwithstanding the clear command of § 169A(a)(4) and (b)[6] to fully control visibility impairment through the SIPs, and the broad objective stated in § 110(a)(2)(E) "to protect visibility," and was upheld by the Court of Appeals. App. A-13. Since the § 126 petition mechanism is designed to remedy specific cases of interstate pollution, a petitioner is entitled to relief when it demonstrates "visibility impairment"[7] substantially attributed to interstate pollution. EPA's failure to promulgate a nationwide regulatory program for regional haze

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[6] 42 U.S.C. § 7491(a)(4) and (b).

[7] The Act defines "visibility impairment" to "include reduction in visual range and atmospheric discoloration." § 169A(g)(6), 42 U.S.C. § 7491(g)(6). By regulation, EPA has defined "visibility impairment" as "any humanly perceptible change in visibility (visual range, contrast, coloration) from that which would have existed under natural conditions." 40 C.F.R. § 51.301(x) (1987).

cannot be interposed to nullify the protection afforded by § 110(a)(2)(E) or the corresponding right to relief under § 126(b).[8]

The court below incorrectly adopted EPA's interpretation of the Act's interstate provisions.[9] That interpretation is inconsistent with decisions in three other circuits, as well as in prior decisions of the Circuit Court below. These decisions have all viewed a § 126 petition as the proper mechanism to obtain consideration of the interstate impact of existing emissions. The Second Circuit has held that § 126(b) provides an entirely separate procedural means (apart from a proceeding under § 110 itself) for testing whether a SIP meets the requirements of § 110(a)(2)(E). *Connecticut v. EPA*, 656 F.2d 902, 907 (2nd Cir. 1981); *accord, Alabama Power Co. v. Costle*, 636 F.2d 323, 367 (D.C. Cir. 1979). The *Connecticut* decision confirms that "the substantive inquiry for decision is the same in both proceedings." 656 F.2d at 907. The Sixth and Seventh Circuits pointed to the § 126(b) petition as the appropriate vehicle for considering the interstate impact of multiple sources. *New York v. EPA*, 710 F.2d 1200, 1205

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[8] The legality of this regulatory delay is being separately tested. (*Maine, et al. v. Thomas*, 690 F.Supp. 1106 (D.Me. 1988), *appeal docketed* (1st Cir. No. 88-1983)).

[9] The Circuit Court's reliance on *Chevron, U.S.A., Inc. v. Natural Resource Defense Council*, 467 U.S. 837 (1984), is misplaced. A reviewing court should not defer to an agency's interpretation of a statute when "it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned." *Chevron, supra.* at 845, *quoting United States v. Shimer*, 367 U.S. 374, 382, 383 (1961).

(6th Cir. 1983); *New York v. EPA*, 716 F.2d 440, 445 (7th Cir. 1983). The decision below is the first to reject that position. EPA's construction, endorsed by the Court below, would allow widespread and serious cases of interstate pollution by emission sources covered by existing SIPs to go unchecked, as indeed they have been for the past eleven years. App. A-16, (Ruth B. Ginsburg, concurring.)

Congress cannot be presumed to have intended that any part of its statutory enactment would be null and void. Even more certainly, the intention of statutory amendments expressly designed to strengthen control of interstate air pollution[10] could not have been a reduction of the statute's protection against interstate air pollution.[11]

The agency has taken no affirmative action against sources of interstate air pollution under either Section 126(b) or Section 110(a)(2)(E) in the more than ten years since those provisions were enacted, a course of inaction which has rendered the remedial provisions null and void.

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[10] *Connecticut v. EPA*, 656 F.2d 902, 909 (2d Cir. 1981); *Alabama Power Co. v. EPA*, 636 F.2d 323, 366-67 (D.C. Cir. 1979).

[11] As noted above at p. 5, EPA construed the 1970 version of Section 110(a)(2)(E) to require only a mechanism for exchanging information among the states, an obligation embodied in regulation at 40 C.F.R. § 51.21(c) (1972). EPA's only regulatory response to the repeal and replacement of Section 110(a)(2)(E) in 1977 was to repeal its regulation. 44 Fed. Reg. 35179 (June 18, 1979) *repealing* 40 C.F.R. § 51.21(c).

CONCLUSION

The Petitioners respectfully request this Court to grant certiorari to consider whether the interstate provisions of the Clean Air Act have been seriously misconstrued by EPA and the Court below.

Dated: October 20, 1988

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued April 26, 1988 Decided July 22, 1988

No. 84-1592

STATE OF NEW YORK, et al., PETITIONERS

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY and WILLIAM RUCKELSHAUS, ADMINISTRATOR, RESPONDENTS

MONONGAHELA POWER COMPANY,
THE NORTH AMERICAN COAL CORPORATION,
NACCO MINING COMPANY,
CINCINNATI GAS & ELECTRIC COMPANY, et al.,
PEABODY HOLDING COMPANY, et al.,
INTERVENORS

No. 85-1082

COMMONWEALTH OF PENNSYLVANIA,
STATE OF NEW YORK and STATE OF MAINE,
PETITIONERS

V.

U.S. ENVIRONMENTAL PROTECTION AGENCY and LEE THOMAS, ACTING ADMINISTRATOR, RESPONDENTS

PEABODY HOLDING COMPANY, et al.,
CINCINNATI GAS & ELECTRIC COMPANY, et al.,
NORTH AMERICAN COAL CORPORATION, et al.,
MONONGAHELA POWER COMPANY,
TENNESSEE VALLEY AUTHORITY,
INTERVENORS

Petitions for Review of an Order of the
Environmental Protection Agency

Gregory W. Sample and *Thomas Y. Au*, with whom, *Robert Abrams*, Attorney General of New York, *David R. Wooley*, Assistant Attorney General of New York, *James M. Shannon*, Attorney General of Massachusetts, *Lee Breckenridge*, Assistant Attorney General of Massachusetts, *J. Wallace Mally, Jr.*, Assistant Attorney General of Vermont, *Paul H. Schneider*, Deputy Attorney General of New Jersey, *the Honorable Richard Ottinger*, and *James E. Tierney*, Attorney General of Maine, were on the joint brief for petitioners. *Robert Whitehead, Jr.*, *Kenneth N. Tedford* and *Francis X. Bellotti* also entered appearances for petitioners.

Michael A. McCord, Attorney, Department of Justice, with whom *Roger J. Marzulla*, Acting Assistant Attorney General, *Alan W. Eckert*, Associate General Counsel, Environmental Protection Agency, and *Charles S. Carter*, Attorney, Environmental Protection Agency, were on the brief for respondents. *Peter Everett*, *Margaret N. Strand* and *Michael W. Steinberg*, Attorneys, Department of Justice also entered appearances for respondent.

Edward Berlin, with whom, *Vern R. Walker*, for Cincinnati Gas & Electric Company, et al.; *James R. Bieke*, *Frederick C. Schafrick*, for Peabody Holding Company, Inc., et al.; *Ronald R. Janke*, for North American Coal Corporation and NACCO Mining Company; *Michael H. Holland* and *Earl R. Pfeffer* for amicus International Union, United Mine Workers of America were on the joint brief for intervenors, Cincinnai Gas & Electric company, et al. *Thomas M. Lemberg*, also entered an appearance for Cincinnati Gas & Electric Company, et al.

Lawrence A. Demase and *J. Daniel Hull* were on the brief for intervenor, Monongahela Power Company.

Edward S. Christenbury, James E. Fox, Thomas C. Doolan and *Gregory R. Signer* were on the brief for intervenor, Tennessee Valley Authority. *Herbert S. Sanger,* also entered an appearance for intervenor, Tennessee Valley Authority.

Before RUTH B. GINSBURG and SENTELLE, *Circuit Judges,* and PALMIERI,* *Senior District Judge.*

Opinion for the Court filed by *Circuit Judge* SENTELLE.

Separate concurring opinion filed by *Circuit Judge* RUTH B. GINSBURG.

SENTELLE, *Circuit Judge:* Petitioners challenge the Environmental Protection Agency's (EPA) denial of petitions filed by three eastern states under section 126 (b) of the Clean Air Act ("the Act"). 42 U.S.C. § 7426 (b). We find that the EPA denial of these petitions is based on a reasonable interpretation of the relevant statutes and is not arbitrary of capricious. We therefore deny the petitions, with the exception of the petition of the state of New York which we remand to the Agency for the submission of new data.

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*Of the United States District Court for the Southern District of New York, sitting by designation pursuant to 28 U.S.C. § 294(d).

I. BACKGROUND

The Clean Air Act establishes joint state and federal responsibility for control of the nation's air pollution. 42 U.S.C. §§ 7401-7642 (1982). Sections 108 and 109 of the Act, 42 U.S.C. §§ 7408 and 7409, grant authority to EPA to set national ambient air quality standards (NAAQS) limiting permissible concentrations of air pollutants. Pursuant to this statutory authority the EPA has established NAAQS for a number of pollutants, including the NAAQS for sulfur oxides, measured as sulfur dioxide (SO_2), 40 C.F.R. § 50.4, and for particulate matter, measured as total suspended particulate matter ("TSP"), 40 C.F.R. § 50.7 (1984). On July 1, 1987, EPA promulgated a new particulate matter standard–the PM_{10} standard–which replaced the TSP standard. 52 Fed. Reg. 24,634.

Section 110 of the Act, 42 U.S.C. § 7410, requires that within nine months after the promulgation or revision of an NAAQS each state must adopt and submit to the Administrator a plan providing for the implementation, maintenance, and enforcement of the standard in each air quality control region within the state. Within four month after the required submission of each state implementation plan ("SIP"), the EPA approves or disapproves the plan based on, among other things, the eleven criteria set forth in §§ 110(a)(2)(A)-(K) of the Act. 42 U.S.C. §§ 7410(a)(2)(A)-(K). Subsequent revision to an SIP is subject to approval by the same criteria. 42 U.S.C. § 7410(a)(3).

The requirements of § 110 include provisions dealing with certain types of interstate air pollution. Obviously, air movement across state borders is inevitable and the

Act does not purport to bar interstate pollution but rather requires each SIP to contain measures

> (i) prohibiting any stationary source within the State from emitting any air pollutant in amounts which will (I) prevent attainment or maintenance by any other State of any such national primary or secondary ambient air quality standard, or (II) interfere with measures required to be included in the applicable implementation plan for any other State under part C of this subchapter to prevent significant deterioration of air quality or to protect visibility, and (ii) insuring compliance with the requirements of section 7426 of this title, relating to interstate pollution abatement[.]

42 U.S.C. § 7410(a)(2)(E).

Section 126(b) of the Act provides that any state "may petition the Administrator for a finding that any major source emits or would emit any air pollutant in violation of the prohibition of § 7410(a)(2)(E)(i)[.]" 42 U.S.C. § 7426(b). EPA then has sixty days from the receipt of the § 7426(b) petition to hold a public hearing and either make the requested finding or deny the petition, notwithstanding any permit granted by the state in which the source is located or intends to locate. 42 U.S.C. §§ 7426(b), 7426(c). Upon a finding of such violation of § 110(a)(2)(E), no new or modified source can be built or operated in violation of the Act's interstate requirements and existing sources must either cease operations within three months or submit to a schedule designed to ensure compliance with controlled requirements eliminating the impermissible interstate pollution as expeditiously as practicable. 42 U.S.C. § 7426.

The administrative decision challenged herein involved EPA's disposition of petitions under section

126(b) filed by Pennsylvania, New York and Maine. Separate section 126 petitions filed by the three states in 1980 and 1981 alleged violations of NAAQS and impaired visibility within the borders of each state, substantially attributable to the cumulative impact of SO_2 emissions in seven mid-western states. In the atmosphere, SO_2 gas is transformed into tiny particles known as sulfate.[1] Thus the above-reference EPA NAAQS for SO_2 and particulate matter are both implicated in this instance by the same pollution sources.

The initial petition, filed by Pennsylvania on December 19, 1980, sought a determination that 38 specific sources in Ohio and West Virginia prevented attainment and maintenance of the SO_2 ambient standards in four Pennsylvania counties and its southwestern air quality region. On December 22, 1980 and January 16, 1981, New York filed nine petitions alleging that 19 specific sources in the states of Illinois, Indiana, Michigan, Ohio, Tennessee and West Virginia were preventing attainment and maintenance of the TSP standard in New York. EPA consolidated the petitions and scheduled a hearing for June 18 and 19, 1981. Two weeks before the hearing, Pennsylvania supplemented its petition and expanded its allegations to include all major emitters of SO_2 in Ohio, West Virginia, Illinois, Indiana and Kentucky. At the hearing, New York submitted a list of 59 sources and later amended its petition to include all sources of SO_2 and

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[1] National Academy of Sciences, "Atmosphere Biosphere Interactions: Toward a Better Understanding of the Ecological Consequences of Fossil Fuel Combustion," 1981, pp. 62-63, 144 (Joint Appendix at p. 0570).

particulates under SIPs in the six states it originally named and Kentucky.

After the hearing, Maine filed its petition on October 7, 1981, alleging that SO_2 derived sulfate particulates were interfering with its ability to prevent significant deterioration (PSD) and protect visibility as required by 42 U.S.C. §§ 7470-7491 (Part C requirements incorporated by reference in 42 U.S.C. § 7410(a)(2)(E)(i)(II)). Maine alleged that a "regional haze" at Acadia National Park was the responsibility of all "SO_2 sources in the seven mid-western states cited by New York and Pennsylvania" and confessed an inability to trace the effects to any specific source or list of sources. The further proceedings on the three petitions were consolidated.

After extensive proceedings on the three petitions, including an eleven month comment period which closed in May of 1982, the three petitioning states sued in United States District Court seeking an order requiring EPA to decide the petitions. That court ordered EPA to render a decision on the petitions within 60 days. *State of New York v. Ruckelshaus,* 21 Env't Rep. Cas. (BNA) 1721 (D.D.C. October 5, 1984). On December 10, 1984, EPA published a denial of each state's petition. 49 Fed. Reg. 48,152, 48,157. The states then filed these petitions for review pursuant to the judicial review section of the Clean Air Act. 42 U.S.C. § 7607.

II. ANALYSIS

A. *EPA's Duty Under Section 126(b)*

EPA has interpreted § 126(b) as requiring that four elements be met before relief will be provided. Those

elements are: (1) Section 126(b) provides relief with respect to only those pollutants for which National Ambient Air Quality Standards have been set or PSD or visibility measures required; (2) Section 126(b) provides redress for violations alleged to have occurred in specified geographic areas; (3) Section 126(b) provides relief with respect to interstate pollution that results in the violation of an NAAQS or PSD increment, or interferes with required SIP measures to protect visibility; and (4) Where an NAAQS or PSD increment or proscribed visibility impairment occurs, the out-of-state source or sources must make a significant contribution to the levels of pollution causing the violation or impairment. 49 Fed. Reg. 34,856-58.

Petitioners argue that § 126(b) provides a statutory mechanism to implement an affirmative duty, created by § 110(a)(2), to review existing SIPs to determine whether the SIPs are adequate to prevent impermissible interstate impacts. Specifically, Petitioners contend that the filing of their section 126(b) petitions immediately obliged EPA to take the investigatory steps necessary to determine whether the SIPs in all named upwind states were in compliance with § 110(a)(2)(E).

Section 110(a)(2)(E) prescribes substantive standards against which the interstate impacts of SIPs must be judged. The Administrator contends that his responsibility to evaluate SIPs for compliance with § 110(a)(2)(E) is linked to his review of an otherwise required submission by a state. In other words, the Administrator contends that § 110(a)(2)(E) does not require reevaluation and revision of existing SIPs, and that a section 126(b) petition does not trigger such review. We agree.

Petitioners' argument centers on the contention that the substantive inquiry under § 126(b) is the same as that under § 110(a)(2). *See Connecticut v. EPA*, 656 F.2d 902, 907 (2d Cir. 1981). If indeed it is the same substantive inquiry, and we will assume for these purposes it is, then the language of § 126(b) supports the Administrator's interpretation of § 110(a)(2)(E).

The language of § 126(b) is quite specific and focuses on "major sources," not the validity of a state's SIP: "Any State or political subdivision may petition the Administrator for a finding that *any major source* emits or would emit any air pollution in violation of the prohibition of section 7410(a)(2)(E)(i) of this title." 42 U.S.C. § 7426(b) (emphasis added). The elements EPA has derived from § 126(b) are reasonable and therefore, this Court will not disturb EPA's interpretation. *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984).

Congress specified that the Administrator take final action on a section 126(b) petition very quickly: "Within *60 days after receipt of any petition* under this subsection and after public hearing, the Administrator shall make such a finding or deny the petition." 42 U.S.C. § 126(b) [sic] (emphasis added). Under Petitioners' theory, once a section 126(b) petition has been filed, the Administrator would be required to engage in an entire array of investigative duties. In particular, the Administrator would be required to undertake a full-scale investigation of the adequacy of the SIPs of all states named in the petition for all pollutants involved, to conduct whatever data-gathering and research is necessary to either prove Petitioners' claims or affirmatively disprove their allegations, and to develop whatever new air pollution models are

necessary to confirm or affirmatively disprove Petitioners' modeling theories, as well as conducting a public hearing, analyzing the evidence presented by all interested parties, proposing a determination, considering all comments submitted and promulgating a final rule–all within 60 days of receipt of the petition.[2] It is reasonable to conclude that Congress did not intend that the Administrator be required to perform all these duties in such a short period of time in the absence of the clearest expression. *See Chevron*, 467 U.S. 837.

In addition, the language of § 110(a)(2) resists Petitioners' interpretation and conversely, lends support to the Administrator's. Section 110(a)(2) contains no language expressly directing the Administrator to reevaluate existing SIPs. When Congress has intended to establish a requirement for direct EPA action it has said so. In 1977, Congress explicitly ordered the promulgation of EPA regulations addressing a variety of matters, including new source performance standards, noncompliance penalties, stack height credit, and visibility protection requirements. 42 U.S.C. §§ 7411(f), 7420(a), 7423(c), 7491(a)(4). The statute also directs EPA to undertake other actions, including periodic reassessments of existing ambient standards and new source performance standards. *See* 42 U.S.C. §§ 7409(d)(1), 7411 (b)(1)(B).

In one instance Congress specifically directed EPA to investigate the adequacy of existing SIPs. Section 124 of the Act, which is entitled "Assurance of adequacy of

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[2] With the possibility of extension pursuant to section 307(d)(10), 42 U.S.C. § 7607(d)(10).

State plans," *expressly* requires EPA to review the adequacy of existing plans with regard to dependence by major fuel burning sources on petroleum products and natural gas. 42 U.S.C. § 7424. That section, unlike § 110(a)(2)(E), sets up a procedure for accomplishing the task. Again, where Congress wanted EPA to review the adequacy of existing SIPs, it said so. Against that backdrop, Congress' silence in § 110(a)(2)(E) is significant.

Not only is § 110(a)(2)(E) itself devoid of any requirement for direct action by the EPA, but the legislative history is similarly barren. *If* any Congressional intent can be divined from this silence, it must be an intent *not* to require affirmative action. If Congressional intent cannot be determined then we must defer to EPA's construction of the statute so long as it is a permissible one. *Chevron*, 467 U.S. 837.

Petitioners attempt to rely on § 406(d)(2) (which is not codified) of the 1977 Amendments, 42 U.S.C. § 7401 (note), as the basis for an independent duty to review all existing SIPs and require revisions where necessary to conform to § 110(a)(2)(E). They argue that § 406(d)(2) required that within one year of enactment of the 1977 Amendments, the states had an obligation to revise their SIPs in accordance with § 110(a)(2)(E). The Administrator contends, and again we agree, that § 406(d)(2) only sets the timetable for actions to revise an SIP "by reason of any amendment made by this Act." Section 406(d)(2) itself creates no independent obligation to revise an SIP; it merely addresses the timing of SIP revisions separately required by other provisions of the 1977 Amendments. *See generally Sierra Club v EPA*, 719 F.2d 436, 469 (D.C.

Cir. 1983). Section 406(d)(2) provides no support for Petitioners' argument.

The Administrator's review of various SIP revisions submitted by states is an ongoing process, and under the Administrator's interpretation the prohibition of § 110(a)(2)(E) is one of the requirements that must be met before he can approve any initial SIP or revision. Because the Administrator's construction of § 110(a)(2) is consistent with the plain language of that provision and is a reasonable one, this Court must accept it. *Chemical Mfrs. Ass'n v. NRDC*, 470 U.S. 116 (1985); *Chevron*, *467 U.S. 837*.

B. The Petitions

Petitioners' position before this Court so thoroughly relied on their misconception that §§ 110 and 126 of the Act imposed a duty on the EPA to review SIPs that the affirmance of the Administrator's interpretation of those statutes is largely dispositive of the issues argued before us; nonetheless, we will address the Agency's treatment of each state's petition. In none of the three instances was the denial arbitrary or capricious.

Maine

Maine presented evidence that, under certain weather conditions, sulfate particles transported from seven mid-western states caused the formation of "regional haze" that impairs visibility at Acadia National Park, an area where visibility is specially protected under § 169A of the Act. 42 U.S.C. § 7491. EPA denied the petition because "Maine had not adopted the required visibility measures contained in the Federal regulations; moreover, such visibility measures at this time do not

address regional haze." 49 Fed. Reg. 48153; *see State of Vermont v. Thomas*, No. 87-4119 (2d Cir. June 23, 1988) (current regulations do not encompass federally enforceable measures to alleviate "regional haze").

Because Maine's claims in this proceeding concern only the problem of regional haze, Maine has not presented any claim which falls within the ambit of § 126(b), which incorporates the substantive standard of § 110(a)(2)(E). In other words, Maine does not allege that major sources in any other states are interfering with visibility measures contained in its SIP-its SIP does not contain regional haze visibility measures. Maine has failed to make even a threshold showing of entitlement under § 126(b).[3] Therefore, EPA properly denied Maine's petition.

Pennsylvania

Pennsylvania's challenge to EPA's action on its petition is now directed to three particular areas in southwestern Pennsylvania. The sole question is whether EPA

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[3] To the extent that Maine is asserting that regional haze requirements must be in SIPs, this constitutes an untimely attack on the 1980 regulations. Such an attack is barred by § 307(b)(1) of the Act, which requires that judicial review be brought within 60 days of a final action by EPA. 42 U.S.C. § 7607(b)(1); *Group Against Smog and Pollution v. EPA*, 665 F.2d 1284, 1289 (D.C. Cir. 1981).

To the extent Maine is implicitly arguing that EPA should be compelled to promulgate regulations dealing with regional haze, its claim is beyond the jurisdiction of this Court. A nondiscretionary duty to take action under the Act can only be enforced in a federal district court suit pursuant to § 304(a)(2). 42 U.S.C. § 7604(a)(2).

was justified in not concluding that SO_2 emissions from major sources in Ohio and West Virginia prevented attainment or maintenance by Pennsylvania of the NAAQS for SO_2 in the subject areas.

The three areas are located in the West Virginia-Ohio border area (Border area), the Beaver Valley Air Basin (Beaver Valley area) and the Monongahela Valley Air Basin (Monongahela Valley area). Pennsylvania submitted no actual monitoring data showing violations of the SO_2 standards in the Border area. It relied on a modeling study (Cramer Study), commissioned by the EPA, which purported to predict violations in that area. The state argues that the Cramer Study represents the best modeling techniques available.

Because the Border area was not included in the original area of the Cramer Study, EPA contends that the results for that area are subject to several problems. Although violations of the SO_2 standard were predicted, the results were only "preliminary" due to questionable meteorological assumptions and questions regarding the accuracy of the emissions inventories for the out-of-state sources used in the model. In fact, the author of the Cramer Study conceded that additional work would be needed before firm results could be obtained. EPA thoroughly analyzed the Cramer Study and its applicability to the Border area and concluded that it did not provide a reasonable basis for determining that SO_2 violations were occurring in that area.

It is well established that when a court is reviewing predictions within an agency's area of special expertise, at the frontiers of science, the "court must generally be at

its most deferential." *Baltimore Gas & Electric Co. v. NRDC*, 462 U.S. 87, 103 (1983). "[A]s long as Congress delegates power to an agency to regulate on the borders of the unknown, courts cannot interfere with reasonable interpretations of equivocal evidence." *Public Citizen Health Research Group v. Tyson*, 796 F.2d 1479, 1505 (D.C. Cir. 1986). Acceptance or rejection of a particular air pollution model and the results obtained from it are interpretations of scientific evidence. This Court cannot say that the Administrator's rejection of the Cramer Study was in any way unreasonable.

The Cramer Study did not predict a violation in the Beaver Valley area and Pennsylvania submitted no monitoring data showing an actual violation. It was therefore reasonable for the EPA to deny the section 126(b) petition with regard to the Beaver Valley Area.

Pennsylvania failed to submit any monitoring data showing an actual violation in the Monongahela Valley area. The Cramer Study predicted a violation at one site in that area, which was one of the areas covered by the original study. However, EPA estimated that more than 80% of the SO_2 contributing to the predicted violation would come from Pennsylvania sources, and that therefore the out-of-state sources did not "significantly contribute" to the violation. Once again this Court is being asked to second-guess the scientific judgments of the EPA. Once again, we are at our "most deferential." *Baltimore Gas*, 462 U.S. at 103. And, once again, we cannot say that the EPA's assessment of the scientific evidence was unreasonable. Therefore, Pennsylvania's petition will be denied.

New York

On July 1, 1987, EPA promulgated a new national ambient air quality standard for particulate matter which replaces the previous TSP standards. EPA contended in its brief that New York's claim had been mooted by this change and that, therefore, New York's petition should be dismissed.

However, at oral argument, EPA raised no objection to a remand for submission of new data rather than dismissal with leave to re-petition. Therefore, we remand New York's petition (and New York's petition only) for submission of new data relevant to the new NAAQS.

III. CONCLUSION

The Administrator's interpretation of § 110(a)(2)(E) and § 126(b) is consistent with the statutory language and is reasonable. The section 126(b) petitions of Maine and Pennsylvania were properly rejected by the EPA; accordingly, we deny Maine's and Pennsylvania's petitions for review. New York's petition is remanded for reconsideration in light of the revised TSP NAAQS. *It is so ordered.*

GINSBURG, RUTH B., *Circuit Judge, concurring:* I join fully in Judge Sentelle's opinion and write separately only to spotlight a reality that the language of the the Clean Air Act condones. As counsel for the EPA acknowledged at oral argument, the EPA has taken *no* action against sources of interstate air pollution under either § 126(b) or § 110(a)(2)(E) in the decade-plus since those provisions were enacted. Congress, when it is so minded,

is fully capable of instructing the EPA to address particular matters promptly. *See, e.g.*, section 124 of the Act, 42 U.S.C. § 7424, added by the 1977 amendments (Administrator shall review state implementation plans with regard to dependence of major sources on petroleum products and natural gas within eighteen months of August 7, 1977); court's opinion at 9. Congress did not supply such direction in this instance; instead, it allowed and has left unchecked the EPA's current approach to interstate air pollution. The judiciary, therefore, is not the proper place in which to urge alteration of the Agency's course.

Appendix B

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[AD-FRL-2724-1]

Interstate Pollution Abatement, Final Determination

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final Determination under section 126 of the Clean Air Act (Interstate Pollution Abatement).

SUMMARY: Section 126 of the Clean Air Act provides a means by which any State or political subdivision may petition the EPA for relief from impermissible interstate air pollution. The States of Pennsylvania, New York, and Maine filed section 126 petitions in 1980 and 1981, claiming that air pollution from sources in the midwest prevented the petitioning States from attaining and maintaining national ambient air quality standards (NAAQS), consumed a portion of their prevention of significant deterioration (PSD) increments, interfered with visibility, and caused acid rain.

A public hearing was held on June 18-19, 1981, and the record held open until March 18, 1982, due to the extensive nature of the comments submitted, which included technical information and the petitioner's rebuttal arguments. On September 4, 1984 (49 FR 34851), after reviewing all of the material submitted, the Administrator proposed to deny the petitions, having determined that, while pollution does cross State lines into the petitioning States, the petitioning States' demonstrations did

not adequately support their claims of injury. Upon review of the comments received in response to the proposed determination, EPA can find no reason to change its position. Therefore the Administrator is today issuing his final determination to deny those petitions.

DATE: The Administrator's determination is effective December 10, 1984.

SUPPLEMENTARY INFORMATION:

I. Background

A more extensive discussion of the many statutory, legal, and technical issues involved in this decision may be found in the September 4, 1984, proposed determination (49 FR 34851).

A. Section 126

In 1977, Congress added section 126 to the Clean Air Act in order to provide States with a measure of protection, under certain circumstances, against pollution from sources, located outside their borders, over which they normally have no control. Section 126 provides for the intervention of the Administrator in instances when interstate air pollution can be shown to be preventing the attainment of NAAQS or interfering with those PSD or visibility measures which the Act requires to be included as a part of a State implementation plan (SIP).

Under Section 126, a State or political subdivision may petition the Administrator for a finding that an out-of-state source is emitting air pollution in violation of the prohibitions against interstate air pollution contained in

section 110(a)(2)(E)(i) of the Clean Air Act. If the Administrator finds that a clear violation of section 110(a)(2)(E)(i) exists, he may prohibit the construction or continued operation of new or existing sources found to be in violation, or require that existing sources found to be in violation comply with a schedule to meet more stringent emission limits.

B. The Petitions

1. Pennsylvania

On December 19, 1980, Pennsylvania petitioned EPA under section 126 for a finding that 38 named sources in Ohio and West Virginia were preventing attainment and maintenance of the sulfur dioxide (SO_2) NAAQS and consuming a portion of the SO_2 PSD increment in some areas of southwestern Pennsylvania. The petition also requested a finding that particulate matter, including sulfate particulates resulting from the transformation of SO_2 from those named midwestern sources, was preventing the attainment and maintenance of the NAAQS for total suspended particulates (TSP), consuming a portion of the TSP PSD increment, and causing acid deposition. On June 4, 1981, Pennsylvania amended its petition to include all major sources of SO_2 and TSP in Ohio, West Virginia, Illinois, Indiana, and Kentucky.

2. New York

On December 22, 1980, and January 16, 1981, New York filed nine petitions under Section 126 asking EPA for a finding that SO_2 from 19 named sources in Illinois,

Indiana, Michigan, Ohio, Tennessee, and West Virginia was being transported and transformed into sulfate particulates which were preventing the attainment and maintenance of TSP NAAQS, consuming a portion of the TSP PSD increment, interfering with visibility, and causing acid rain. New York subsequently amended its petition to include all sources of SO_2 and particulates subject to SIPs in the six States and Kentucky.

3. Maine

On October 7, 1981, Maine filed a petition under Section 126 requesting a finding that sulfates resulting from SO_2 emissions in the seven States named by Pennsylvania and New York were consuming a portion of the TSP PSD increment in southern Maine, interfering with visibility at Acadia National Park, and causing acid deposition. Maine waived its right to a public hearing on the condition that its petition be consolidated with those of Pennsylvania and New York.

C. The Public Hearing

After receiving the Pennsylvania and New York petitions, EPA issued a notice of pubic hearing on May 1, 1981 (46 FR 24602), and held a 2-day hearing on June 18-19, 1981, to gather testimony relating to the petitioners' allegations. Upon request, EPA twice extended the comment period, finally closing the record on March 18, 1982 (47 FR 1304). During the comment period, EPA received Maine's petition and, at Maine's suggestion, waived a separate hearing and consolidated the petition with those of Pennsylvania and New York (46 FR 55551).

D. The Proposed Determination

The petitions and the comments which were generated as a result of the public hearing created an extensive record and raised a number of legal and technical issues. Those issues elicited considerable comment during the public comment period on the proposed determination. Those issues and comments are discussed in section II, Summary of Response to Comments.

The proposed determination addressed the four basic allegations made in the petitions: (1) That SO_2 from seven midwestern States is transformed in that atmosphere and transported as sulfates into the petitioning States, resulting in acid deposition; (2) that SO_2 from sources in Ohio and West Virginia is causing violations of the SO_2 NAAQS and consuming a portion of the SO_2 PSD increment in southwestern Pennsylvania; (3) that SO_2 from the seven midwestern States is being transformed into sulfate particulates which are transported long distances, causing violations of the TSP NAAQS in Pennsylvania and New York and consuming a portion of the TSP PSD increments in Pennsylvania, New York, and Maine; and (4) that the sulfate particulates are forming a "regional haze" which is interfering with visibility in New York and Maine. The following is a summary of the position taken by EPA on each of these issues in the proposed determination.

1. Acid Deposition

As stated in the May 1, 1981, notice of public hearing (46 FR 24603), EPA believes that section 126 does not provide authority for regulating emissions of pollutants

for which there are no NAAQS, PSD increments, or visibility measures. Therefore the proposed determination did not address the issue of acid deposition (49 FR 34856-57). Section 126 is limited to pollutants for which NAAQS or PSD increments have been established, and to measures under Part C for visibility. In particular, complaints about the levels of sulfates *per se* in the ambient air are insufficient to invoke section 126. Sulfate particulates, however, can constitute a portion of TSP and may thus be considered in the context of alleged violations of the standards for that pollutant for the purposes of section 126.

2. SO_2 Violations-Pennsylvania

Due to the lack of any ambient monitoring data showing violations, that portion of Pennsylvania's petition relating to direct SO_2 impacts relied on results from a modeling study performed by a consultant, H.E. Cramer Company, Inc. As noted in the report of the study, the study was conducted for the purpose of assisting in the determination of the attainment/nonattainment status of selected areas in southwestern Pennsylvania. Although adequate for the task intended, the analysis suffered technically when the study area was expanded in an attempt to gauge the background concentration caused by out-of-State sources. The study predicted two areas to be in violation of the SO_2 NAAQS; however, only one was located in the region originally intended for study. That area's SO_2 emissions are dominated by a nearby in-State major source, and Pennsylvania sources make up about 80 percent of the predicted SO_2 air quality levels. The other area predicted to be in violation was not in the

portion of southwestern Pennsylvania that was the subject of the original investigation. This second area, a grid located on the Pennsylvania-West Virginia border, was modeled in a preliminary fashion after the main modeling effort was completed. The meteorological conditions used were for the original study areas and therefore not necessarily representative of the border grid. In addition, the emission inventories for areas outside the original study area were not scrutinized as closely as were the inventories for nearby sources, and because of the lack of monitoring data, the models were not adequately validated. Due to these limitations, EPA proposed to deny that portion of Pennsylvania's petition alleging violations of the SO_2 NAAQS. Also, because Pennsylvania did not submit evidence of the existence of any violations of the SO_2 PSD increments, there was no demonstration of interference with PSD measures and EPA therefore proposed to deny that portion of the petition alleging such interference.

3. TSP Violations

All three petitioners claimed that particulate matter, including sulfate particulate, was being transported into the petitioning States in amounts which exceeded the TSP NAAQS and consumed a portion of the PSD increment in violation of section 110(a)(2)(E)(i). The petitions focused on the long-range transport of sulfates resulting from the chemical conversion in the atmosphere of SO_2 emissions alleged to originate in the seven midwestern States named in the petitions. Although, as discussed previously, interstate sulfate pollution *per se* cannot be used as the basis for a section 126 petition, such pollution may be

used to invoke that section when the sulfates are considered as particulates which contribute to TSP. Upon reviewing the data submitted by the petitioners, EPA found that: (1) When and where the TSP NAAQS were exceeded, sulfates did not constitute a significant portion of the TSP levels in the petitioning States, (2) sulfates from sources in the Midwest had not been demonstrated to comprise a significant portion of the annual sulfate levels in the petitioning States, and (3) the magnitude of the various geographic components of transported sulfates had not been adequately defined. Analysis of the petitioners' data indicated that the sulfate levels were not corrected for artifact formation caused by the sampling technique, and that in many instances the TSP NAAQS would have been exceeded even if the sulfate component were eliminated entirely from the samples. Finally, even if the petitioners' monitoring and modeling data were acceptable, those data would indicate that the sulfates from the midwestern States contribute only 4-6 percent to exceedances of annual TSP NAAQS in the petitioning States. Therefore, EPA proposed to deny that portion of the petitions alleging prevention of attainment of the TSP NAAQS (49 FR 34864).

The petitioning States also did not claim nor submit evidence of violations of the TSP PSD increments, nor did they demonstrate the extent to which sulfates from midwestern States contribute to increment comsumption in the petitioning States. Therefore, EPA proposed to deny that portion of the petitions alleging interference with PSD measures for particulate matter.

4. Visibility Interference

Both New York and Maine claimed that sulfates caused by midwestern sources were transported into their respective areas creating a regional haze which interfered with visibility. Visibility protection measures required by section 169A of the Clean Air Act and contained in EPA regulations are applicable only in mandatory Class I Federal areas and pertain to visibility impairment which can be reasonably traced back to stack emissions through visual techniques. Since New York has no Class I areas, EPA proposed to deny that portion of New York's petition alleging visibility impairment. Furthermore, Maine had not adopted the required visibility measures contained in the Federal regulations; moreover, such visibility measures at this time do not address regional haze. EPA therefore proposed to deny that portion of Maine's petition relating to visibility impairment.

II. Summary of Response to Comments

Eighteen commenters responded to the proposed determination. Comments were responded to in a comment response document which has been placed in the Docket (Docket item IV-D-22). The reader is referred to that document for detailed responses to comments. The comments addressed both legal and technical aspects of the determination. This section provides a summary of responses to major comments.

A. Legal Issues

1. Which Pollutants Are Addressed by Section 126?

Several commenters urged EPA to make a finding under section 126 regarding acid deposition. They argued

that EPA, by denying the petitions, was ignoring the issue of acid deposition.

EPA is not ignoring the issue. To the contrary, the Administrator has acknowledged on numerous occasions the importance of finding a solution to the problems caused by acid deposition. Although EPA recognizes the problems, the Agency can act under section 126 only on those transboundary problems to which the statute is addressed. Section 126 provides that:

Any State or political subdivision may petition the Administrator for a finding that any major source emits or would emit any air pollution in violation of the prohibition of section 110(a)(2)(E)(i).

In turn, section 110(a)(2(E)(i) prohibits:

* * * any stationary source withing the State from emitting any air pollutant in amounts which will: (I) Prevent attainment or maintenance by any other State of any such *national primary or secondary ambient air quality standard* or (II) interfere with measures *required to be inluded* in the applicable implementation plan for any other State under part C to prevent significant deterioration of air quality or to protect visibility * * *. (Emphasis added.)

It is clear from the language of the Clean Air Act that section 126 can only apply to those pollutants for which NAAQS exist, i.e., the criteria pollutants TSP, SO_2, carbon monoxide, ozone, oxides of nitrogen, and lead, and to those PSD or visibility measures required to be part of a SIP. Moreover, the only PSD measures that can be interfered with in the context of sections 126 and 110 are required measures such as the ambient air increments established for TSP and SO_2 and the visibility protection measures in Federal visibility regulations (40 CFR

51.300-51.307). The referenced visibility regulations address only that visibility impairment, occurring in mandatory Class I Federal areas, which is considered to be "plume blight" – that is, smoke, dust, colored gas plumes, or layered haze emitted from stacks which obscure the sky or horizon and are relatable to a single source or group of sources (45 FR 80085). Thus the scope of section 126 does not extend to acid deposition, sulfates *per se*, or to the "regional haze" visibility impairment of which the petitioning States complain.

2. Burden of Proof

The petitioning States contended that EPA should bear the burden to ensure that SIPs of upwind States do not violate the interstate pollution prohibition of section 110(a)(2)(E). Once a petitioner comes forward with evidence of impermissible interstate pollution, the States argued, EPA must research the claim and provide a detailed statement of the basis and purpose of its determination. One petitioner noted that a petitioning State has at most the ability to review and model emission limitations in SIP's, and determine if an air quality problem exists. Thus, it should be EPA's responsibility to conduct such further modeling as is necessary for regulatory action. Another petitioner stated that once a petitioning State shows that another State may significantly contribute to impermissible interstate pollution, the burden of disapproving that assertion falls upon the Administrator and the offending State.

The test applied to the judicial review of final agency rulemaking decisions such as this does not depend on

burden of proof concepts. The burden of proof is a concept more applicable to the efforts of several parties to pursuade an independent decision maker than to Agency rulemaking. Under section 307(d) of the Clean Air Act, EPA discharges its responsibilities in rulemaking by explaining, as it has done in both its proposed and final determination, that the record contains no clear demonstration that contributions from sources in the named States exist in amounts large enough to be considered significant in the context of a violation of the applicable standards.

Moreover, under the Administrative Procedures Act, 5 U.S.C. 556(d), even in formal proceedings the burden of producing facts needed to support the requested action is generally placed on the proponent of a rule. In this case, the petitioning States are the proponents since they are requesting findings under section 126. Simply because section 307(d) of the Act requires EPA to make its determination on the merits of a petition does not convert EPA's role into that of a proponent.

In the case of section 126 petitions, however, EPA has not held and will not hold petitions to a formal trial-type burden of proof. EPA recognizes that it has an obligation independent of the standard of review for this particular decision to investigate and develop information on this area of public policy. EPA has already indicated that it is working to improve its modeling techniques for long-range transport, and has an extensive ongoing program

of research and development on acid deposition (see 49 FR 34864). However, where this particular decision is concerned, any such burden must be evaluated against the prima facie strength of the concerns raised by petitioners, and against the relative ability of the various parties to clarify the points in question. EPA, in compiling and reviewing the record, took into account the scientific and technological uncertainties which afflict this area of decision making. Indeed it accepted, for purpose of analysis, the most favorable view of the States' evidence.

This is not a case, moreover, in which shifting the burden of proof to EPA is appropriate because there is unequal access to available knowledge. Rather, the analysis of the interstate pollution problems presented here is one in which the avenues of accuracy are equally obscured for all parties. Thus, EPA has a comparative advantage relative to the States only to the extent that it may command greater resources for furthering technological advance over time. On the current facts of the present situtation, however, EPA has no superior vantage point.

Were the balance of this particular record, even given the uncertainties which attend it, more delicately weighted, the burden of proof issue might appear as more decisive. In this case, however, the data already available suggest that the petitioners fall so far short of demonstrating entitlement to a finding under section 126 that the burden of proof is virtually irrelevant. Petitioners demand not so much that EPA supplement the record as that EPA develop a new record, a claim neither justifiable nor feasible.

In recognition of the seriousness of the allegations and the difficulties of proof, EPA has in this instance imposed upon the States no greater proof burdens than the minimum required by the statute. Even so, the available evidence simply fails to establish their claims.

3. What Air Quality Levels Cause Section 126 To Be Invoked?

Numerous comments were received on the interrelated issues of what is meant by the terms "prevent" and "interfere" as used in section 110, and on the extent to which out-of-State sources must contribute to such prevention or interference in order to form the basis of a section 126 petition.

Some commenters agreed with, and some commenters took issue with, EPA's position that in order for a PSD measure to be interfered with in the context of section 110, a PSD increment must be violated. Those who objected did so in part by noting that the term "interfere" is not as stringent as the term "prevent," and thus the term "interfere" carried the implication that a smaller effect is required as a basis of a section 126 petition for PSD than for NAAQS. The commenters also claimed that to require a prerequisite increment violation would impose a no-win or, as one commenter stated, a "catch-22" situation on a petitioning State by virtue of the fact that the SIP would have to be adjusted in the petitioning State to prevent the violation, thus eliminating the basis for a section 126 petition. Commenters also complained that EPA's interpretation meant that out-of-State sources could consume almost all of the petitioning

State's increment without causing a violation and could thereby prohibit growth in the petitioning State.

EPA's position is that the provisions of section 110 which refer to SIP requirements prohibiting a source from emitting pollutants which would prevent attainment or maintenance of a NAAQS or interfering with PSD measures must be read consistently, and that minor differences in the meaning of words, taken out of context, can be misleading.

Preventing attainment of a standard requires that the standard has not yet been reached. Likewise, preventing maintenance requires that the standard was reached, but not sustained. In the case of NAAQS, the standard is a numerical value which, when violated, is not being attained. In the case of a NAAQS violation, it is obvious that attainment is being prevented. Air quality may range up to the level of the standard, but unless the standard is violated, or predicted to be violated, its attainment and maintenance have not been prevented. EPA received no adverse comments on this interpretation of the term "prevent" as used in section 110.

The PSD measures required to be included in a SIP by the Clean Air Act take the form of a new source permitting system for areas which are attaining NAAQS or which are unclassifiable. For TSP and SO_2, this permitting system prevents major new construction that would cause a violation of the TSP or SO_2 PSD increments. The PSD increments are the allowable ranges of pollutant increases for particular pollutants. Within a State, EPA

enforcement of that State's PSD program is specified by Federal regulations (40 CFR 52.21) which generally require violation of an increment before intervening action can be taken. Section 110(a)(2)(E)(i) cannot be interpreted as giving EPA broader enforcement power to go beyond the increments in cases of out-of-State pollution. To say, as do some commenters, that the term "interfere" implies that a less intrusive effect is required to form the basis of a section 126 petition and that a more rigorous test of partial consumption of increment or elevation of baseline should apply, is in itself inconsistent. Such an interpretation would mean that Congress granted EPA authority over out-of-State sources that it does not possess over in-State sources.

EPA recognizes that an existing violation of a PSD increment would require adjustment of the SIP to correct the problem and, that if those corrections involve control of interstate sources, that a section 126 petition may be appropriate. EPA also recognizes that a violation of a PSD increment would prohibit the construction or operation of any new source or sources which would further contribute to the violation, regardless of whether the impact of the new source occurred in-State or out-of-State. Thus, the comment that growth may be inhibited by increment consumption is valid; such situations may occur and are just as likely to be caused totally by in-State sources. In such instances, EPA cannot intervene absent an increment violation, and the same should be true in the case of consumption by out-of-State sources.

Some commenters noted that the PSD measures required to be included in SIP's also included visibility protection and requested that EPA not limit the scope of

the requirements for section 126 action to PSD increments.

The separation of the discussion of PSD increments and visibility was a result of the form chosen to address the claims filed by the petitioners. The Agency agrees with the commenters that PSD measures include provisions for visibility protection, and it was not the intent of EPA to imply otherwise. However, in the proposed determination EPA chose, as did Congress in section 110 and the States of New York and Maine in their petitions, to treat visibility separately. The NAAQS and PSD increments consist of numerical values against which measured or predicted ambient air quality can be compared. Visibility has no such reference point. The discussion of PSD increments in the proposed determination does not preclude the filing by any State of a section 126 petition claiming that a visibility protection measure required by the PSD regulations is being interfered with.

4. On Significant Contribution v. "But for" Test

In its proposed determination EPA found that to be entitled to relief under section 126, a petitioning State must show that an out-of-State source makes a "significant contribution" to the levels of pollution causing a NAAQS or PSD increment violation (49 FR 348958-348959). [sic: Should be 34858-34859] Both industry and State commenters addressed EPA's articulation and application of this standard. On the one hand, industry commenters complained that EPA should have applied a stricter test since the word "prevent" in the statute connotes something more than significant contribution. Industry commenters argued that EPA should not

find a section 126 violation unless it is shown that the petitioning State would attain the NAAQS or PSD requirements "but for" the emissions from identified out-of-State sources. One commenter added that this "but for" test was a necessary but not sufficient condition for a section 126 finding.

On the other hand, the petitioning States criticized EPA not for adopting the significant contribution standard, but rather for applying a stricter standard in its actual determination. The States complained that when EPA referred to out-of-State contributions in terms of "a major" portion, factor, or contribution, or characterized local sources as "predominantly" causing nonattainment, EPA imposed a harsher test than the significant contribution test. Several States also complained of EPA's efforts, in ascertaining whether a given level of pollution significantly contributes to a violation, to strike a balance between the extent of the aggregation of out-of-State sources and the size of the contribution (49 FR 34864).

EPA reviewed in detail the comments relating to this point, which in most respects reiterate the arguments which were made and considered prior to the issuance of EPA's September 4 proposed determination. EPA remains of the view that the so called "but for" test is both ambiguous in meaning and inappropriate for application to section 126. Under one interpretation of this standard, a State would be required to revise its SIP to make as much room as possible for interstate pollution before seeking section 126 relief. Under this interpretation, a State would only be entitled to relief in the few unusual cases where the out-of-State pollution was causing a violation that the petitioning State could not cure by limiting

its own sources, see 47 FR 6626 (1982), even if the in-state limits required would be drastically stricter than those applicable to the out-of-State sources. Under another interpretation, a State would be entitled to relief if it had an "adequate" air quality program that would attain and maintain national standards within its borders "but for" the contributions of the out-of-State source. The problem here is that the adequacy of the program or the adequacy of a SIP is precisely the issue in question in section 126 petitions. To assume that some standard of adequacy or approval is available that does not deal with significant out-of-State contributions is simply to beg the question.

EPA's application of the significant contribution test to section 126 petitions has been upheld by the Sixth Circuit in the recent case of *Jefferson County, Kentucky*, v. *EPA*, No. 82-3214 (6th Cir. July 10, 1984) at 30-41. Far from slighting the issue of causation, as industry commenters charge, the significant contribution standard confronts this question consistently with statutory purpose and the complexity of the regulatory task.

The State's complaint that EPA applied a standard in the present determination other than the significant contribution test is equally without foundation. The commenting States pluck references to "major" factor or portion out of the context of EPA's overall assessment of whether the evidence supports a finding of "significant" interstate contribution. But it is plain from a reading of EPA's proposed determination that EPA has defined and applied the standard in a manner which most appropriately implements the statutory intent.

Contrary to assertions in some of the comments, EPA has not required that the out-of-State pollution be the sole or the largest single cause of a NAAQS or PSD increment violation in order to support an affirmative finding. Nor has EPA attempted, as some commenters contended, to limit the scope of section 126 to short-range effects caused by a few obvious sources near a petitioning State's borders. EPA has merely enunciated an interpretation of the statutory standard which reflects a sense of proportion in balancing a multiplicity of competing interests and factors. In its proposed determination, EPA enumerated a nonexhaustive list of factors which the Administrator might take into account in determining whether a contribution is significant (49 FR 34859). A particular factual context may require that some of these factors be given more or less weight, while others (e.g., the relative cost of pollution abatement among contributing sources) may be relevant more to the issue of a remedy than to whether an out-of-State contribution has a significant effect on the failure of a petitioning State to meet a NAAQS or PSD increment. As EPA noted in its proposed determination (49 FR 34859), in the case of the instant petitions, a detailed analysis of these factors was not necessary since on this record the sheer amount of emissions from out-of-State sources in the named States even in the aggregate, is not sufficient to make a significant contribution to violations of the applicable standards. Here, therefore, the application of the test is markedly straightforward.

EPA, upon examination of the available evidence determined that, even accepting the petitioners' data sulfates from the named out-of-State sources do not constitute a significant factor in TSP standard exceedances in the petitioning States.

The data showed first that sulfates from all sources – in-State and out-of-State – comprise only 10-15 percent of TSP on an annual basis and 10-50 percent on a 24-hour basis. Moreover, on those days on which the 24-hour secondary TSP NAAQS is exceeded, it appears that the percentage of sulfates averaged only 10-12 percent of the TSP in the samples (49 FR 34863). Next, the record indicated that the portions of sulfates from out-of-State comprised an even smaller fraction of TSP during periods of exceedances. After noting the considerable scientific and technological uncertainty surrounding evaluations of long-range sulfate transport, EPA accepted, for purposes of analysis, available modeling results proffered by petitioners. These results estimated that Ohio, Illinois, Indiana, Michigan, Kentucky, and Tennessee together contributed a mean (based upon all of the modeling analyses) of 36.8 percent of Adirondack ambient sulfate contributions. Since sulfates comprise only 10-15 percent of the annual TSP levels which exceed the NAAQS, and assuming that the six midwestern States contribute almost 37 percent of this amount, the aggregate contribution is approximately 4-6 percent of the TSP levels (49 FR 34864). EPA could not find that this amount, emanating from a six-State region, constituted a significant contribution to TSP violations. This conclusion, moreover, was buttressed by the inherent uncertainties of the modeling

results, and the absence of more reliable and more specific data linking the Midwest sources to in-State locations.

B. Technical Issues

1. Short-Range SO_2 Modeling

One commenter argued that the modeling analysis upon which the SO_2 portion of Pennsylvania's petition rested, although flawed, did adequately demonstrate that out-of-State sources contributed significantly to violations of the SO_2 NAAQS in portions of southwestern Pennsylvania. The commenter further argued that EPA cannot reject the study results because the study was in fact conducted for, and funded by, EPA.

Scientific information which suffers from admitted technical weaknesses is of limited usefulness. Such information must be accepted with reservation and with bounds on the purposes to which it is put. Pennsylvania relied on the modeling study performed by H.E. Cramer Company, Inc. as the basis for its allegations of NAAQS violations in extreme western Pennsylvania. As pointed out in the September 4, 1984, proposed determination and earlier in this notice, the study suffered from several technical deficiencies. No commenter suggested that the study was not flawed and, regardless of the study sponsorship and regardless of the acceptability of the dispersion models used, the results of the study cannot be accepted as an adequate demonstration of violations of the SO_2 NAAQS and of the level of out-of-State contributions thereto for purposes of granting regulatory relief under Section 126.

2. Sulfate Contribution to TSP Levels

One commenter noted that EPA had proposed a finding on the out-of-State contribution to the annual TSP standard only and had not included the secondary 24-hour standard in the decision.

EPA agrees that the summation language on this issue in the determination does not appear to address the secondary standard (49 FR 34865); however, it is clear from a reading of the prior discussion on the issue of total sulfates (49 FR 34863) that EPA did analyze the available data for both the annual and 24-hour standards. The lack of a specific conclusion regarding the 24-hour standard is indicative of the greater uncertainties and controversial nature of the 24-hour data. To determine a value for the contribution from the named midwestern States, it is necessary to integrate two factors: (1) The percentage of sulfates in TSP, and (2) the percentage of the midwestern States' sulfate to total sulfate. For the results to be useful, the components used must have the same basis. Of the two modeling studies cited in the petitions, one, done for the U.S./Canadian Memorandum of Intent (MOI), expresses results in terms of annual values and the other, done for the Dunkirk area, expresses its result in terms of a monthly average. Obviously, the MOI modeling cannot be used for determining contributions to the 24-hour standards and, unfortunately, the result of the modeling done for the Dunkirk area, which consists of only one monthly value, is also of limited usefulness for determining contributions to either the annual or the 24-hour standard. Thus, the only calculation which can be justified is that performed for the annual standard.

One commenter disputed EPA's calculation of the out-of-State contribution to the annual TSP levels, claiming that the value should be higher, as indicated by calculated values provided in the comment.

Commenter's values are calculated by combining annual values and monthly values and thus cannot be used justifiably for the demonstration required. In addition, the monthly value utilized included a contribution from a State not among the named midwestern States.

III. Final Determination

EPA has reviewed all of the comments submitted in response to the September 4, 1984, proposed determination. For reasons discussed above and in the comment response document (Docket Item IV-D-22), EPA can find no compelling evidence which would cause the Agency to change its position on the issues.

Relief under the Clean Air Act must be based on a finding that pollution originating in one State prevents another State from attaining or maintaining a NAAQS or interferes with measures required to be included in the other State's SIP for PSD or protection of visibility. The evidence fails to demonstrate that sources in the named midwestern States are preventing the attainment or maintenance of the SO_2 or TSP NAAQS or interfering with PSD or visibility measures required to be included in petitioning States' SIP's. Therefore, the Administrator is today denying the petitions filed, under section 126 of the Clean Air Act, by Pennsylvania, New York, and Maine.

Under Section 307(b)(1) judicial review of EPA actions is bifurcated, with actions of local or regional

applicability prescribed for the United States Court of Appeal "for the appropriate circuit" while actions of "nationwide scope or effect" are limited to review in the United States Court of Appeals for the District of Columbia based on a finding by the Administrator. Based on the multi-regional nature of this determination, and the multiplicity of judicial circuits which might thereby be argued to be "appropriate" the Administrator finds that under section 307(b)(1) judicial review of this action should be limited to the United States Court of Appeals for the District of Columbia. Therefore, such review is available only by filing a petition for review in that circuit within 60 days of today's publication of this determination.

List of Subjects in 40 CFR Part 52

Air pollution control, Ozone, Sulfur oxides, Nitrogen dioxide, Lead, Particulate matter, Carbon monoxide, Hydrocarbons, Intergovernmental relations.

Dated: December 4, 1984.

William D. Ruckelshaus,
Administrator.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 84-1592

September Term, 1987

State of New York, et al., Petitioners
v.
U.S. Environmental Protection Agency and
William Ruckelshaus, Administrator, Respondents

Monongahela Power Company,
The North American Coal Corporation,
NACCO Mining Company,
Cincinnati Gas & Electric Company, et al.,
Peabody Holding Company, et al., Intervenors

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and consolidated case No. 85-1082

PETITIONS FOR REVIEW OF AN ORDER OF THE ENVIRONMENTAL PROTECTION AGENCY

Before: RUTH B. GINSBURG and SENTELLE, Circuit Judges, and PALMIERI*, Senior District Judge

JUDGMENT
(Filed July 22, 1988)

These causes came on to be heard on the petitions for review of an order of the Environmental Protection Agency and were argued by counsel. On consideration thereof, it is

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*Of the United States District Court for the Southern District of New York, sitting by designation pursuant to 28 U.S.C. § 294(d).

ORDERED and ADJUDGED, by the Court, that the petition for review in No. 85-1082 is denied and case No. 84-1592 is remanded, in accordance with the Opinion of the Court filed herein this date.

Per Curiam
FOR THE COURT:

Constance L. Dupre
CONSTANCE L. DUPRE,
CLERK

Date: July 22, 1988
Opinion for the Court filed by Circuit Judge Sentelle.
Concurring opinion filed by Circuit Judge Ruth B. Ginsburg.

No. 88-684 (2)

Supreme Court, U.S.
FILED
DEC 22 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

STATE OF MAINE, COMMONWEALTH OF PENNSYLVANIA, STATE OF CONNECTICUT, STATE OF VERMONT, STATE OF NEW HAMPSHIRE, STATE OF NEW JERSEY, and RICHARD L. OTTINGER,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and LEE THOMAS, Administrator, CINCINNATI GAS & ELECTRIC COMPANY *et al.*, MONONGAHELA POWER COMPANY, NORTH AMERICAN COAL CORPORATION *et al.*, PEABODY HOLDING COMPANY, INC., *et al.*, and TENNESSEE VALLEY AUTHORITY,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF IN OPPOSITION FOR RESPONDENTS PEABODY HOLDING COMPANY, INC., AND PEABODY COAL COMPANY

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December 22, 1988

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INTRODUCTORY STATEMENT REGARDING QUESTIONS PRESENTED

As explained in this brief, Questions 1 and 2 in the petition for certiorari are not presented by this case.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-684

STATE OF MAINE, COMMONWEALTH OF PENNSYLVANIA, STATE OF CONNECTICUT, STATE OF VERMONT, STATE OF NEW HAMPSHIRE, STATE OF NEW JERSEY, and RICHARD L. OTTINGER,

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Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF IN OPPOSITION FOR RESPONDENTS PEABODY HOLDING COMPANY, INC., AND PEABODY COAL COMPANY

Respondents Peabody Holding Company, Inc., and Peabody Coal Company respectfully urge that the petition for certiorari be denied.[1] While these respondents be-

[1] The stock of Peabody Holding Company, Inc., is owned as follows: Newmont Mining Corporation (49.97%), Bechtel Investments, Inc. (15.01%), The Boeing Company (15.01%), Eastern

lieve that the Court of Appeals correctly decided this case, they submit a separate brief to show that Questions 1 and 2 in the petition are not presented by this case.

STATEMENT OF THE CASE

Statutory Scheme

The Clean Air Act of 1970 established a scheme whereby the U.S. Environmental Protection Agency ("EPA") was directed to establish national ambient air quality standards ("NAAQS") for air pollutants to protect the public health and welfare (§ 109), and the States were required to develop and submit state implementation plans ("SIPs") to attain and maintain the NAAQS within their borders (§ 110).[2] EPA was directed to approve those SIPs if they met specified requirements (§ 110(a)(2)). EPA has adopted NAAQS for various pollutants, including particulate matter and sulfur dioxide ("SO_2"), and the States have developed SIPs to achieve those standards. In the 1977 Amendments to the Act, Congress adopted a new provision (§ 169A) that established a goal of remedying impairment of visibility in "class I Federal areas" (*e.g.*, national parks) and directed EPA to adopt regulatory requirements for SIPs to make "reasonable progress" toward meeting that goal.

Associated Securities Corp. (15.01%), and the Equitable Life Assurance Society of the United States (5%). All of the stock of Peabody Coal Company is owned by Peabody Holding Company, Inc. In addition, these respondents have the following subsidiaries or affiliates which are not wholly owned: North Antelope Coal Company, Squaw Creek Coal Company, Yaamba Joint Venture, Dominion Terminal Associates, Tecumseh Coal Corporation, Yankeetown Dock Corporation, Rail to Water Transfer Corporation, and Kayenta Mobile Homes Park.

[2] Sections 109 and 110 of the Act are codified at 42 U.S.C. §§ 7409 and 7410, respectively. The U.S.C. citations for the other sections of the Act referred to herein may be found in the Table of Authorities.

Also in 1977, Congress adopted new provisions dealing with interstate air pollution. Section 110(a)(2)(E) requires that, as a condition for approval, a SIP must contain "adequate provisions" prohibiting sources in that State from emitting pollutants that will "prevent attainment or maintenance" of the NAAQS in another State or will "interfere with measures required to be included" in another State's SIP to prevent significant deterioration of air quality or to protect visibility. Section 126(b) authorizes any State to petition EPA for a finding that any major source in another State emits or would emit pollutants that would violate the prohibition of § 110(a)(2)(E).

Administrative Proceedings

In 1980 and 1981, the States of Pennsylvania, New York, and Maine filed petitions with EPA under § 126(b). Those petitions presented EPA with three distinct claims. First, both Pennsylvania and New York contended that emissions of SO_2 from all major sources in seven Midwestern States were, after conversion in the atmosphere of the SO_2 to sulfate (a particulate) and long-range transport of such sulfates by air currents, preventing attainment and maintenance of the NAAQS for *particulate matter* in Pennsylvania and New York. In reviewing this claim, EPA considered at length the evidence on sulfate and total suspended particulate matter ("TSP") levels in Pennsylvania and New York and the extent to which those levels could be attributed to SO_2 emissions in the Midwestern States. 49 Fed. Reg. 34851, 34862-65 (Sept. 4, 1984); 49 Fed. Reg. 48152, 48153, 48156-57 (Dec. 10, 1984) (App. B to Pet. at B-7 to -8, B-21 to -24). It found that "out-of-State sources from the named [Midwestern] States do not contribute significantly to violations of the [particulate matter] NAAQS" in Pennsylvania and New York. 49 Fed. Reg. 34865; see also 49 Fed. Reg. 48152, 48156, 48157 (App. B to Pet. at B-8, B-21, B-24).

Second, Pennsylvania claimed that SO_2 emissions from certain specified sources in southeastern Ohio and northwestern West Virginia were preventing attainment and maintenance of the NAAQS for SO_2 in areas of southwestern Pennsylvania. EPA rejected this claim on the ground that Pennsylvania had presented no actual monitoring data to show any violation of the NAAQS for SO_2 in southwestern Pennsylvania and that the modeling analysis submitted was inadequate to demonstrate such a violation or significant out-of-State contributions to a predicted violation.[3] 49 Fed. Reg. 34859-61; 49 Fed. Reg. 48153, 48156 (App. B to Pet. at B-6 to -7, B-22).

Third, Maine contended that SO_2 emissions from the Midwest were, through conversion to sulfate and long-range transport, causing regional haze that interfered with visibility at Acadia National Park in Maine. EPA rejected this claim on the legal ground that Maine had not adopted any of the visibility protection measures actually required by EPA's regulations to be included in SIPs, and that, moreover, EPA's regulations implementing § 169A did not require SIPs to include any measures to address regional haze. 49 Fed. Reg. 34865-66; 49 Fed. Reg. 48153, 48154 (App. B to Pet. at B-9, B-11). Since Maine thus did not and could not claim interference with measures "required to be included" in its SIP to protect visibility (as provided by § 110(a)(2)(E)), EPA denied Maine's petition for failure to state a claim under §§ 110(a)(2)(E) and 126(b).

In summary, EPA concluded that its review of the best available data failed to show that pollution sources in the named Midwestern States were preventing attainment or maintenance of the NAAQS for particulate matter or SO_2 in the petitioning States or interfering

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[3] Dispersion modeling employs mathematical formulas to estimate airborne concentrations of pollutants resulting from a source's emissions.

with visibility protection measures *required to be included* in those States' SIPs. 49 Fed. Reg. 34866; 49 Fed. Reg. 48157 (App. B to Pet. at B-24).

Proceedings in the Court of Appeals

In the Court of Appeals, Pennsylvania abandoned its broad claim of interstate impacts on the NAAQS for particulate matter and presented only its limited claim that SO_2 emissions from certain sources in Ohio and West Virginia were preventing attainment and maintenance of the NAAQS for SO_2 in areas of southwestern Pennsylvania. App. A to Pet. A-13 to -14. The court rejected that claim, upholding EPA's technical determination that the evidence was insufficient to support it. *Id.* at A-14 to -15. New York did initially present the broad claim of interstate impacts from the seven Midwestern States on the NAAQS for particulate matter in New York; but EPA, during the pendency of the case, revised the particulate matter NAAQS to change the indicator pollutant from TSP to a different indicator. As a result, New York sought a remand to allow it to submit new data relevant to the revised NAAQS, and the court remanded New York's petition for that purpose. *Id.* at A-16. Finally, Maine pressed its visibility claim, but the court rejected that claim on the legal ground that, since Maine's SIP did not contain regional haze measures, Maine "failed to make even a threshold showing of entitlement under § 126(b)." *Id.* at A-13.

INTRODUCTION TO AND SUMMARY OF ARGUMENT

Petitioners claim that this case "involves the single largest and best documented case of transboundary air pollution occurring within the United States"—*i.e.*, the alleged impact of SO_2 emissions from the Midwestern States on "very high ambient sulfate levels, regional haze and acid rain" in the Northeastern States. Pet. at 8. In this context, they assert that this case presents the broad

legal issue of EPA's duty, either in general or in reviewing a § 126(b) petition, to review the SIPs of the Midwestern States to determine their adequacy under § 110 (a)(2)(E) to prevent such impacts in the Northeastern States. They contend that EPA's denial of their petitions "effectively precludes any abatement" of these interstate pollution problems. *Id.*

In fact, however, the petition before this Court does not involve the broad impacts alleged by petitioners and does not present the broad legal issue regarding EPA's duty to review the Midwestern SIPs to determine their compliance with § 110(a)(2)(E). The only claims that remain before this Court are Pennsylvania's limited claim of interstate impacts on the NAAQS for SO_2 in southwestern Pennsylvania and Maine's claim of interstate impacts on visibility in Maine. Both these claims were rejected by EPA and the Court of Appeals on independent grounds that are wholly sufficient to support their determinations and that would obviate any possible need for EPA to review the overall adequacy of the Midwestern SIPs.

Furthermore and in any event, in response to the § 126(b) petitions, EPA undertook a careful scrutiny of the petitioning States' arguments and evidence and denied those petitions on the merits. That inquiry is essentially the same substantive inquiry as would be involved in reviewing the adequacy of the Midwestern SIPs under § 110(a)(2)(E) with respect to the impacts in the petitioning States. Hence, even assuming *arguendo* that EPA had a duty to review the Midwestern SIPs under § 110(a)(2)(E), its consideration and denial of the § 126(b) petitions constituted, in effect, the same substantive review which the petitioning States would have obtained under § 110(a)(2)(E).

ARGUMENT

As noted above, Pennsylvania in the Court of Appeals abandoned its broad claim of interstate impacts from the seven named Midwestern States upon the NAAQS for particulate matter, and New York's similar claim was remanded to allow the submission of new data relevant to the revised NAAQS for particulate matter. New York does not seek review in this Court, and no party has sought review of the Court of Appeals' remand of New York's petition. Thus, the only claims before this Court are Pennsylvania's more limited claim relating to the NAAQS for SO_2 and Maine's visibility claim, and those claims do not raise the broad issues and impacts alleged by petitioners.[4]

Pennsylvania's claim in the Court of Appeals related only to the impact of SO_2 emissions from certain sources in Ohio and West Virginia on the NAAQS for SO_2 in areas of southwestern Pennsylvania. EPA had no need to review the overall adequacy of the Midwestern SIPs to deal with this claim. It denied that claim on the technical ground that there were no monitoring data showing a violation of the NAAQS for SO_2 in southwestern Pennsylvania and that the modeling submitted was inadequate. The Court of Appeals upheld that independent technical determination, and review is not sought of that aspect of the court's decision. Thus, disposition of Pennsylvania's claim does not involve any need to resolve the question of EPA's duty to review the Midwestern SIPs under § 110(a)(2)(E).

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[4] This case does not involve "acid rain" (more correctly known as acid deposition) at all. As EPA found, there are no NAAQS, "prevention of significant deterioration" requirements, or visibility protection measures dealing specifically with acid deposition, and hence acid deposition *per se* is not encompassed within the prohibition of § 110(a)(2)(E). See 49 Fed. Reg. 48153 (App. B to Pet. at B-5 to -6).

Maine's claim likewise does not present that broad issue. Maine argued that regional haze resulting from Midwestern SO_2 emissions was impairing visibility in Acadia National Park. EPA rejected that claim on the ground that regional haze measures were not included in Maine's SIP and were not required by EPA's visibility protection regulations to be included in SIPs, and that hence Maine's petition failed to state a claim for relief under §§ 110(a)(2)(E) and 126(b). The Court of Appeals affirmed that legal determination. If that threshold ruling was correct, there was no reason for EPA to go any further in reviewing the adequacy of the Midwestern SIPs under § 110(a)(2)(E), and there is thus no need for this Court to consider EPA's duty to make such a review.[5]

In any event, even if the petitioners' claims did raise the broad issue of the impact of SO_2 emissions from the Midwestern States on sulfate or particulate matter levels in the Northeast, this case is not appropriate for review by this Court. To begin with, the Court of Appeals

[5] Petitioners do challenge the correctness of EPA's and the Court of Appeals' determination on that threshold legal issue. While they do not deny that EPA's visibility protection regulations under § 169A of the Act do not require regional haze measures to be included in SIPs, they claim that that fact does not negate their entitlement to relief under § 126(b). Pet. at 12-13. Apparently, petitioners' argument is that the Act itself, in § 169A, requires SIPs to include regional haze measures. *Id.* As the Court of Appeals held, however, this argument constitutes an untimely attack on EPA's visibility protection regulations, which were adopted in 1980. App. A to Pet. at A-13 n.3. Section 307(b)(1) of the Act requires that judicial review of EPA regulations be sought within 60 days of their publication, and Maine never challenged EPA's 1980 regulations for failure to include regional haze measures. Petitioners do not challenge the Court of Appeals' determination that their challenge to EPA's regulations is untimely. Moreover, to the extent that Maine is claiming that EPA has a nondiscretionary duty under § 169A to adopt regional haze regulations, that claim is the subject of separate litigation currently pending in the First Circuit. Pet. at 13 n.8.

properly upheld EPA's interpretation of the Act to the effect that § 110(a)(2)(E) did not require a wholesale review and reevaluation of all existing SIPs to determine their adequacy *per se* to prohibit impermissible interstate impacts, and that petitions under § 126(b) likewise did not trigger a requirement for such extensive, full-scale review of existing SIPs. App. A to Pet. at A-8 to -12.

Moreover, even if it were assumed *arguendo* that EPA had a duty under § 110(a)(2)(E) to review the adequacy of the Midwestern SIPs to prevent impermissible impacts in the petitioning States, the petitioning States in effect have had such a review in response to their petitions. EPA gave close scrutiny to the evidence and arguments submitted by the petitioning States regarding the impacts potentially attributable to Midwestern sources, and it found that the best available evidence failed to show that sources in the named Midwestern States were having impermissible impacts under § 110(a)(2)(E) in the petitioning States. 49 Fed. Reg. 34866; 49 Fed. Reg. 48157 (App. B to Pet. at B-24).[6] As petitioners themselves admit (Pet. at 13) and as the Court of Appeals assumed (App. A to Pet. at A-9), the inquiry for decision under § 126(b) is the same substantive inquiry as that under § 110(a)(2)(E).[7] Thus, the

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[6] For instance, in reviewing the claims of Pennsylvania and New York regarding the alleged interstate impacts on the NAAQS for particulate matter, EPA found that: (a) total sulfates from all sources did not constitute a significant portion of TSP levels in those States on occasions when the NAAQS were violated; (b) sulfates transported from Midwestern sources were not shown to constitute a significant portion of annual sulfate levels in the petitioning States; (c) the magnitude of various geographic components of transported sulfates had not been adequately defined; and (d) therefore sources in the named Midwestern States could not be said to contribute significantly to violations of the NAAQS in the petitioning States. 49 Fed. Reg. 34865; 49 Fed. Reg. 48153, 48157 (App. B to Pet. at B-8, B-24).

[7] Petitioners assert that the decision below was inconsistent with the decision of another court of appeals that the substantive in-

careful inquiry and review that EPA undertook in response to the § 126(b) petitions was no different in substance from that which would be involved in reviewing the adequacy of the Midwestern SIPs under § 110(a)(2)(E) insofar as the impact on the petitioning States is concerned. Accordingly, EPA's denial of the § 126(b) petitions on the ground that emissions from the Midwestern States were not shown to be having impermissible impacts under § 110(a)(2)(E) in the petitioning States was a rejection of the only conceivable violation of § 110(a)(2)(E) about which the petitioning States had standing to complain. In these circumstances, EPA's failure to state explicitly that the Midwestern SIPs had adequate provisions to prevent violations of § 110(a)(2)(E) in the petitioning States was, at worst, harmless procedural error and does not warrant review by this Court.

CONCLUSION

For the foregoing reasons, respondents Peabody Holding Company, Inc., and Peabody Coal Company urge this Court to deny the petition for a writ of certiorari.

Respectfully submitted,

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quiry under §§ 126(b) and 110(a)(2)(E) is the same. Pet. at 13-14. This assertion makes no sense, since the court below did assume, for purposes of deciding the case, that the substantive inquiry is the same under both provisions. App. A to Pet. at A-9.

No. 88-684 (3)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

STATE OF MAINE, COMMONWEALTH OF PENNSYLVANIA, STATE OF CONNECTICUT, STATE OF VERMONT, STATE OF NEW HAMPSHIRE, STATE OF NEW JERSEY, and RICHARD L. OTTINGER,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and LEE THOMAS, Administrator, CINCINNATI GAS & ELECTRIC COMPANY, *et al.*, MONONGAHELA POWER COMPANY, NORTH AMERICAN COAL CORPORATION, *et al.*, PEABODY HOLDING COMPANY, INC., *et al.*, TENNESSEE VALLEY AUTHORITY,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION OF RESPONDENTS CINCINNATI GAS & ELECTRIC COMPANY, *ET AL.*, MONONGAHELA POWER COMPANY AND TENNESSEE VALLEY AUTHORITY

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-684

STATE OF MAINE, COMMONWEALTH OF PENNSYLVANIA, STATE OF CONNECTICUT, STATE OF VERMONT, STATE OF NEW HAMPSHIRE, STATE OF NEW JERSEY, and RICHARD L. OTTINGER,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and LEE THOMAS, Administrator, CINCINNATI GAS & ELECTRIC COMPANY, *et al.*, MONONGAHELA POWER COMPANY, NORTH AMERICAN COAL CORPORATION, *et al.*, PEABODY HOLDING COMPANY, INC., *et al.*, TENNESSEE VALLEY AUTHORITY,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF IN OPPOSITION OF RESPONDENTS CINCINNATI GAS & ELECTRIC COMPANY, *ET AL.*, MONONGAHELA POWER COMPANY AND TENNESSEE VALLEY AUTHORITY [1]

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[1] The statement required by Rule 28.1 is appended as Attachment 1.

STATEMENT OF THE CASE

The Clean Air Act ("Act"), 42 U.S.C. §§ 7401 *et seq.*, in recognition of the fact that emissions cannot be constrained by state boundaries, provides a procedure whereby a state or political subdivision may seek a finding from the Environmental Protection Agency ("EPA" or "Agency") that any major source located in another state emits, or would emit, any air pollutant that will prevent the attainment or maintenance by the receptor state of any national ambient air quality standard ("NAAQS"), or that will interfere with measures required to be included in a federally mandated "State Implementation Plan" ("SIP") to prevent the significant deterioration of air quality or to protect visibility. This procedure is referred to as a "§ 126 petition."

This case results from EPA's rejection of claims made in § 126 petitions by three receptor states—Pennsylvania, New York, and Maine—that air pollution from Midwestern states was preventing the attainment or maintenance of certain NAAQSs and interfering with visibility. The rejection of these claims was upheld by a unanimous panel of the United States Court of Appeals for the District of Columbia Circuit. The Petitioners here challenge the rejection of one of these claims.

In addition, Petitioners argue that the passage of a new interstate air pollution condition for the approval of SIPs "implicitly" required EPA to review previously approved SIPs and, further, that such review is required "for a specific case" of interstate air pollution raised by a § 126 petition. Petition for Writ of Certiorari [Pet. Cert.] at i. These contentions too were rejected by a unanimous court below.

The contentions raised by Petitioners are insubstantial and, in any event, do not merit review by this Court. The decision below does not conflict with the decision of any other court on the same matter, and does not decide an important issue of federal law that should be settled

by this Court. The petition for a writ of certiorari accordingly should be denied.

1. The Statutory Scheme

The Clean Air Act represents a carefully crafted partnership: EPA is to promulgate "national ambient air quality standards" designed to protect the public health (primary standards) and welfare (secondary standards), and the States are to develop, subject to EPA review, State Implementation Plans designed to achieve the federal standards. Under Section 110(a), States are required to adopt and to submit to the Administrator of EPA (the "Administrator") SIPs within nine months after the promulgation of a NAAQS, and the Administrator "shall approve such plan . . . if he determines" that it meets certain enumerated conditions. 42 U.S.C. § 7410(a)(2). In 1977, Congress adopted numerous amendments to the Clean Air Act,[2] including a provision significantly altering the condition relating to interstate air pollution for the Administrator's approval of a SIP. As a result of the 1977 Amendments, the Administrator

> shall approve such plan . . . if he determines . . . that . . .
>
> > (E) it contains adequate provisions (i) prohibiting any stationary source within the State from emitting any air pollutant in amounts which will (I) prevent attainment or maintenance by any other State of any such national primary or secondary ambient air quality standard, or (II) interfere with measures required to be included in the applicable implementation plan for any other State . . . to protect visibility . . . .

Section 110(a)(2), 42 U.S.C. § 7410(a)(2).[3]

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[2] Clean Air Act Amendments of 1977, Pub.L. 95-95, 91 Stat. 685 ("1977 Amendments").

[3] *See* 1977 Amendments, § 108(a)(4), 91 Stat. 693.

The 1977 Amendments also added a new section to the Clean Air Act, providing that any state or political subdivision may "petition the Administrator for a finding that any *major source* emits or would emit any air pollutant in violation of the prohibition of Section 110 (a)(2)(E)(i)." Section 126(b), 42 U.S.C. 7426(b) (emphasis added).[4] The Administrator, "[w]ithin 60 days after receipt of any petition . . . and after public hearing . . . shall make such a finding or deny the petition." *Id.* If the Administrator finds a § 126(b) violation, a new source, if it is the violator, may not be constructed or operated, and if the offender is an existing source, it must either cease operation within three months or comply with such emission limitations and schedule designed to ensure compliance with the requirements contained in § 110(a)(2)(E) as expeditiously as practicable, but in no case later than three years after the finding. Section 126(c), 42 U.S.C. § 7426(c).

2. The Administrative Proceedings

The initial petition, filed by Pennsylvania on December 19, 1980, named 38 specific sources in Ohio and West Virginia as responsible for § 126 violations. Thereafter, Pennsylvania by letter supplement, New York by a series of petitions, and Maine in its petition, broadened the challenge to include all major—but unnamed—emitters of SO_2 and total suspended particulates ("TSP") in a broad group of Midwestern states.[5] The petitions[6] were

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[4] *See* 1977 Amendments, § 123, 91 Stat. 724.

[5] *See* Final Determination under section 126 of the Clean Air Act (Interstate Pollution Abatement), ("EPA Decision") *reprinted in* Appendix B, at B-3 to B-4. Five states were included in the Pennsylvania challenge and seven in the challenges filed by New York and Maine. New York at one point named 59 specific sources but then amended its petition to include all sources of SO_2 and TSP in the designated states. Maine at no time named specific sources.

[6] The States that petitioned EPA under § 126 are referred to as the "EPA Petitioners."

consolidated and subjected to extensive analysis by EPA which extended its review on several occasions to permit the receipt and analysis of additional comments from the Petitioners. The Agency also had the benefit of a broad spectrum of advice from other interested persons as well as analyses completed by its own experts. The record ultimately included more than 70 studies dealing predominantly with such highly technical issues as the reliability of long-range transport computer models, the uses and limitations of air trajectory analyses, the technical adequacy of air monitoring equipment, and the chemistry of the transformation in air of sulfur dioxide (a gas) into sulfate (a particulate). Indeed, in their brief below, Petitioners themselves recognized that:

> the existing record reasonably reflects the universe of relevant fact and informed opinion with respect to the several claims. The record is unquestionably the product of a lengthy record-building process fully open to all who wished to participate.

Pet. Br. at 49-50.

Based on this comprehensive record, EPA found:

> The evidence fails to demonstrate that sources in the named Midwestern States are preventing the attainment or maintenance of SO_2 or TSP NAAQS or interfering with PSD or visibility measures required to be included in petitioning States' SIPs.

EPA Decision, App. B-24.

3. The Decision Below

In the Court below, the Petitioners'[7] factual dispute with the Agency was remarkably narrow: all that remained in contention was Pennsylvania's claim that SO_2 from unnamed sources in Ohio and West Virginia were

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[7] The Petitioners below consisted of the EPA Petitioners, plus the States of Connecticut, Vermont, New Hampshire, and New Jersey, the Commonwealth of Massachusetts, and Richard L. Ottinger.

causing violations of the NAAQs for SO_2 in three discrete areas and Maine's claim that unnamed sources in the Midwest were responsible for isolated occurrences of regional haze in Acadia National Park. Opinion at A-12 to A-16 (as reprinted in Appendix A to Pet. Cert.) ("App. A-12 to A-16"). In a unanimous opinion written by Judge Sentelle, in which Judge Ruth Ginsburg concurred fully, the Court rejected Petitioners' challenge to the Administrator's resolution of these narrow factual issues. As to Maine, since its complaint rested exclusively on a claim of regional haze, and as its SIP neither contained nor was required to contain any regional haze visibility measures, the Court agreed that "Maine has failed to make even a threshold showing of entitlement under § 126(b)." App. A-13 (footnote omitted). As to Pennsylvania, since acceptance of its claim required acceptance of predictive models that the Agency found to be unreliable, and as "this Court is being asked to second-guess the scientific judgments of the EPA . . . [a]nd once again, we cannot say that the EPA's assessment of the scientific evidence was unreasonable," Pennsylvania's petition was denied. App. A-15.[8]

The Court below also unanimously rejected the Petitioners' legal contentions (1) that § 110(a)(2)(E) itself, or in conjunction with § 406(d)(2) of the 1977 Amendments,[9] required all states to revise their SIPs and to submit those revised SIPs to EPA for approval to assure compliance with the substantive conditions contained in that provision, and (2) that the filing of the § 126(b)

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[8] The Court upheld EPA's conclusion that air pollution models provided no reasonable basis for determining that violations of the national air quality standard for SO_2 were occurring in two of the three areas. App. A-14. The Court also upheld EPA's conclusion that the prediction by the model of a violation of that standard at one site in the third area was due overwhelmingly to in-state sources of SO_2, and that the out-of-state sources did not "significantly contribute" to the perdicted violation. *Id.* at A-15.

[9] This section of the 1977 Amendments is not codified.

petitions immediately obligated EPA to take the investigatory steps necesary to determine whether the SIPs in all named upwind states were in compliance with § 110 (a) (2) (E). App. A-8.

The Court pointed out that § 110(a) (2) contains no language directing the Administrator to reevaluate existing SIPs, even though "[w]hen Congress has intended to establish a requirement for direct EPA action it has said so." [10] App. A-10. The Court accepted Petitioners' contention that the substantive inquiry under §§ 110(a) (2) (E) and 126 are the same but observed that this "supports the Administrator's interpretation of § 110(a) (2) (E)," namely that the reevaluation and revision of existing SIPs was not required. App. A-8 to A-9. It noted that "[t]he language of § 126(b) is quite specific and focuses on 'major sources,' not the validity of a state's SIP." Thus, in a § 126(b) proceeding, the substantive standards contained in § 110(a) (2) (E) are to be applied to the "major sources" alleged in the petition to cause violations of those standards, and the § 126(b) proceeding does not require EPA to reevaluate the compliance of the entire SIP itself with the substantive requirements of § 110(a) (2) (E).[11] App. A-9.

This Petition for a writ of certiorari followed.

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[10] The Court noted that, by contrast, § 124 of the Act "*expressly* requires EPA to review the adequacy of existing plans with regard to dependence by major fuel burning sources on petroleum products and natural gas." App. A-11 (emphasis in original). Section 124 was added by the 1977 Amendments, 91 Stat. 722, the same legislation which included the version of § 110(a)(2)(E) on which Petitioners rely.

The Court's rejection of Petitioners' construction of § 110(a)(2) also was supported by its finding that the legislative history is "barren" of any suggestion of a requirement for direct action by EPA. App. A-11. As for § 406(d)(2) of the 1977 Amendments, that provision "merely addresses the timing of SIP revisions separately required by other provisions of the 1977 Amendments." *Id.*

[11] The Court below also noted that the statutory requirement for EPA to take final action on a § 126 petition within 60 days is inconsistent with Petitioners' construction of that provision.

SUMMARY OF ARGUMENT

Petitioners seek a writ of certiorari to have this Court pass on three issues: (1) whether § 110(a)(2)(E) "implicitly" directs EPA to review previously approved SIPs under that provision; (2) whether the filing of a petition under § 126(b) obligates EPA immediately to launch a review of the consistency of the SIPs of all named upwind states with § 110(a)(2)(E); and (3) whether § 126(b) affords relief for regional haze allegedly caused by interstate air pollution despite the absence of any regulation governing regional haze. Each of these questions was correctly resolved by the Court of Appeals and there is no conflict among the Circuits.

Moreover, even if the Petitioners were correct in their strained interpretations of §§ 110(a)(2)(E) and 126, the Administrator's conclusion, after the lengthy and comprehensive review of the factual allegations, that the "evidence fails to demonstrate that sources in the named midwestern States" are out of compliance with the substantive requirements of § 110(a)(2)(E), amounted to a determination that the SIPs in those midwestern states meet the amended condition for EPA approval contained in that section. The legal issues relating to EPA's review of SIPs under § 110(a)(2)(E) for which this Court's review is sought by Petitioners are thus not raised by this case.

REASONS FOR DENYING THE WRIT

I. Section 110(a)(2)(E) Does Not Mandate a Review of State SIPs

Petitioners' contention that the amendment to § 110(a)(2)(E) in 1977 somehow compelled the states and EPA to undertake a review of all SIPs was correctly and convincingly disposed of by the Court below.[12]

Petitioners attempt to mute the force of the Circuit Court's construction of the statutory language by citing

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[12] *See* pp. 6-7, *supra*.

scattered passages in the legislative history that show that Congress was concerned about interstate air pollution from existing sources when it enacted the provisions dealing with interstate air pollution in 1977. *See* Pet. Cert. at 9-10. This unexceptionable proposition does not support Petitioners' construction of either § 110(a)(2)(E) or § 126(b). Congress incorporated two specific mechanisms in the statute to provide for the "abatement of pollution from existing sources": [13] (1) the § 126(b) petition procedure with respect to a "major source," and (2) the requirement in § 126(a)(2) for each state to identify "all major existing stationary sources" that could "significantly contribute to levels of air pollution in excess of the [NAAQSs] . . . outside the State . . ." and to notify nearby states about such major sources by November, 1977.[14] The specific mechanisms created by Congress to address the legislative purpose have been fully complied with in this case.[15] The legislative history provides no support whatsoever for Petitioners' view that Congress "implicitly" created a third mechanism, directing EPA to review previously approved SIPs under the amended condition included in § 110(a)(2)(E).[16]

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[13] H.R. Rep. No. 294, 95th Cong., 1st Sess., at 330, *reprinted in* 1977 U.S. Code Cong. & Admin. News 1409.

[14] Clean Air Act §§ 126(a)(1), (a)(2), (b), 42 U.S.C. §§ 7426(a)(1), (a)(2), (b). *See* H.Rep. 95-294 at 330-31; *compare* H.R. 6161 § 309(b) (95th Cong., 1st Sess., April 6, 1977), *reprinted in* 4 Senate Committee on Environment and Public Works, 95th Cong., 2nd Sess., *A Legislative History of the Clean Air Act Amendments of 1977*, at 2446-47, *with* Clean Air Act §§ 126(a)(2), (b).

[15] The § 126(b) mechanism was utilized in this case, and as will be discussed in the next section, it was properly implemented by EPA. If Petitioners had any complaint with the adequacy of the identification and notice concerning major sources required by § 126(a)(2), they should have pursued that grievance more than 10 years ago. In any event, this case does not raise any claims under § 126(a)(2).

[16] The interpretation of the statute given by EPA and approved by the Court of Appeals—that § 110(a)(2)(E) does not mandate

II. Section 126(b) Does Not Mandate a Review of State SIPs

While Petitioners' position is a bit obscure, they appear to argue that upon the filing of a petition under § 126(b), EPA was obliged immediately to review the adequacy of the SIPs of all upwind states. The suggestion that the mere filing of a § 126(b) petition triggers a massive SIP review is at odds with the statute and with logic. As noted by the Court below, "[t]he language of § 126(b) is quite specific and focuses on 'major sources,' not the validity of a state's SIP." App. A-9 [17] Because of the Court of Appeals' thorough and convincing

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EPA to review previously approved SIPs to determine their compliance with the condition for EPA approval of SIPs added by that section—does not render that section meaningless. First, under EPA's interpretation, it must apply the condition in § 110(a)(2)(E) to any proposed amendment to an existing SIP before approving such amendment. Second, any submission of a new SIP by a State must be subject to the condition in that section before it can be approved. Thus, if Congress mandates EPA to establish a NAAQS for sulfates or acid rain, each State would be required by § 110 (a)(1) to submit a SIP which provides for implementation, maintenance, and enforcement of such standard within nine months of its promulgation, and EPA would subject each such SIP to review under the conditions of § 110(a)(2), including subsection (E), with respect to the new NAAQS. As noted by the Court below, "[b]ecause the Administrator's construction of § 110(a)(2) is consistent with the plain language of that provision and is a reasonable one, this Court must accept it." App. A-12, *citing* Chemical Manufacturers Association et al. v. Natural Resources Defense Council, Inc., 470 U.S. 116 (1985); Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., et al., 467 U.S. 837 (1984).

[17] It is not surprising that the section would focus on specific sources, in view of the drastic relief that follows a determination of a § 126(b) violation. *See* § 126(c), 42 U.S.C., § 7428(c). EPA Petitioners' failure to name specific sources alone justified dismissal of their petitions. That the Agency was willing to excuse this deficiency and to consider the possibility that out-of-state sources might be responsible for violations, hardly comports with Petitioners' attempt to portray a recalcitrant regulator.

rejection of Petitioners' contention, we will not repeat all the deficiencies inherent in Petitioners' claim.

Petitioners, by suggesting that weather systems in the Northeast periodically are "characterized by very high ambient sulfate levels, regional haze and acid rain" (Pet. Cert. at 8), attempt to suggest that this case involves important questions of national policy.

As discussed above, § 126(b) allows any state or political subdivision to petition the Administrator for a finding that a major source emits or would emit any air pollutant "in violation of the prohibition of Section 110 (a)(2)(E)(i)." That prohibition is against any stationary source

> emitting any air pollutant in amounts which will (I) prevent attainment or maintenance by any other State of any such *National Primary or secondary ambient air quality standard*, or (II) interfere with measures *required to be included* in the applicable implementation plan for any other State . . . to protect visibility . . . .

(emphasis added). Thus, in pertinent part, the § 126(b) petition mechanism can provide relief only where a NAAQS is involved or where a visibility protection measure is required to be part of a SIP.

The assertion that Midwestern emissions create high ambient sulfate levels and acid rain cannot present an issue under § 126 because the NAAQSs do not directly regulate sulfates[18] or acid rain. Further, as discussed below, no provisions concerning regional haze are required to be included in a SIP. Any remedy—if one is needed—must come from the Congress, *see* App. A-17 (Ruth Ginsburg, J., concurring), or from EPA in re-

[18] Sulfate is a particulate, and as such it can be one component of TSP. Pennsylvania abandoned its claim in the Court of Appeals that Midwestern emissions caused violations of the NAAQS for TSP in Pennsylvania, and no party here challenges the disposition by the Court of Appeals of New York's similar assertion.

sponse to a petition to revise the NAAQSs or EPA's 1980 visibility regulations. 5 U.S.C. § 553(e) (1982); *see also Vermont v. Thomas*, 850 F.2d 99, 104 (2d Cir. 1988).

III. Allegations that Interstate Air Pollution Causes Regional Haze Are Not Cognizable in a § 126(b) Petition Proceeding

Section 126(b) is available to protect visibility measures "required to be included" in a SIP. The Court below upheld the Administrator's rejection of Maine's petition on the ground that regional haze is not regulated and is not covered (or required to be) in Maine's SIP. Because Maine did not present a claim that was cognizable under § 126(b), the Administrator, as the Court below correctly held, was obliged to deny Maine's petition. Maine's real complaint appears to be that the Agency is not moving fast enough with respect to the regulation of regional haze. But the relief available to Maine is to present its argument for regional haze control in a rulemaking petition to revise the 1980 visibility rules.[19]

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[19] 5 U.S.C. § 553(e) (1982); Vermont v. Thomas, 850 F.2d 99, 104 (2d Cir. 1988). The Court below did not sanction the indefinite postponement of "any national regulation of the problem." Pet. Cert. at 12. Instead, it noted that the timeliness of EPA action on regional haze was not an issue presented by Maine's § 126(b) petition. Indeed, as Petitioners acknowledge, "[t]he legality of this regulatory delay is being separately tested." Pet. Cert. at 13, fn. 8.

The Court went on to note that to the extent Maine is attacking the failure of the federal regulations which address what is required to be included in SIPs to protect visibility from regional haze, then it is "an untimely attack on the 1980 regulations. Such an attack is barred by § 307(b)(1) of the Act, which requires that judicial review be brought within 60 days of a final action by EPA." App. A-13 n.3.

IV. The Thorough and Lengthy Review of Petitioners' Claims in This Case Was the Equivalent of the Comprehensive Review of Midwestern SIPs Sought by Petitioners

Section 126(b) requires only that the EPA Administrator "make . . . a finding or deny the petition" within sixty days after receipt of a petition and after a public hearing. In response to the petitions in this case, EPA initiated an extensive administrative review of the claimed violations, compiling a detailed technical record which Petitioners conceded, in their brief below, "reasonably reflects the universe of relevant fact and informed opinion with respect to the several claims . . . . Pet. Br. at 44. The Administrator gave "the most sympathetic reading to the evidence presented by petitioners" yet he could not make "a finding of unlawful interstate pollution." 49 Fed. Reg. 34866 (Sept. 4, 1984).

Petitioners, understandably, do not ask this Court to review those highly technical findings by the expert agency to which Congress has entrusted responsibility for adjudicating § 126(b) claims. As to Pennsylvania's claims—of predicted, not monitored, violations—the Agency carefully reviewed the modeling data upon which the allegation of violations was based and concluded that the data could not credibly support regulatory action.[20] In two of the three geographic areas where violations of the NAAQS for SO_2 were alleged to occur, the data simply failed to provide a reasonable basis for concluding that violations existed. App. A-13 to A-15. As to the

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[20] Respondent Monongahela Power Company's Harrison Power Station, in Harrison, West Virginia, has already withstood a challenge by Petitioner Pennsylvania. In a SIP revision proceeding under Section 110(a)(2) involving nearly identical evidence to that in the instant case, EPA and the Third Circuit determined that the Harrison plant was not responsible for impermissible air quality impacts in Pennsylvania. 45 Fed. Reg. 74478 (Nov. 10, 1980); Pennsylvania v. Costle, 672 F.2d 902 (3rd Cir. 1981) (denying petitions for review).

remaining predicted violation, the Agency concluded that out-of-state sources did not "significantly contribute" to the predicted violation. The Court below correctly observed that "[o]nce again [it was] being asked to second-guess the scientific judgments of the EPA. Once again, we are at our 'most deferential,'" *citing Baltimore Gas & Electric Co., et al. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 103 (1983). App. A-15.

In the final analysis, EPA undertook precisely the inquiry that would have governed the review of the Midwestern SIPs for their conformity with § 110(a)(2)(E). Petitioners concede that the substantive inquiry under § 126(b) is the same as that under § 110(a)(2)(E). In these circumstances, even assuming *arguendo* that the § 126(b) petitions were sufficient to trigger review of the Midwestern state SIPs, EPA's failure to state *in haec verba* that those SIPs have adequate provisions to prevent violations of § 110(a)(2)(E) in the petitioning States was, at worst, harmless procedural error.[21]

V. There Is No Conflict Among the Circuits

Petitioners contend that the decision below "is inconsistent [22] with decisions in three other circuits," referencing *Connecticut* v. *EPA*, 656 F.2d 902 (2nd Cir. 1981); *New York* v. *EPA*, 710 F.2d 1200 (6th Cir. 1983); and *New York* v. *EPA*, 716 F.2d 440 (7th Cir. 1983). Petitioners are in error.

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[21] There seems to be no difference even with respect to the burden of proof. First, EPA "accepted, for purpose of analysis, the most favorable view of the States' evidence." App. B-13. Second, EPA found that "the data already available suggest that the petitioners fall so far short of demonstrating entitlement to a finding under section 126 that the burden of proof is virtually irrelevant." *Id.*

[22] We note with interest that the Petitioners claim that the cited cases are "inconsistent with" rather than in conflict with the decision of the Court below. In fact, the cases are neither "inconsistent with" nor "in conflict with" the decision of the Court below.

As did the Second Circuit in the *Connecticut* case, the Court below assumed that the substantive standard was the same whether EPA was reviewing a SIP under § 110 (a)(2)(E) or reviewing a petition under § 126. There is no conflict on that point. Nor is there a conflict with the decisions of the Sixth and Seventh Circuits. In each of those cases, the Court merely held that EPA acted reasonably in approving a SIP revision governing a single source and in deferring determination of New York's claims that the cumulative SO_2 emissions from sources in the Midwest were having an impermissible effect on New York's ability to meet the NAAQS for TSP until disposition of the state's § 126(b) petition, which was then pending before EPA.

As we have shown, EPA did rule on the merits of New York's claims in the § 126 proceeding,[23] and the Agency and the Court below ruled on the merits of Pennsylvania's claims concerning SO_2. EPA did consider the cumulative impact of numerous sources in the § 126(b) proceeding, but found that "the evidence fails to demonstrate that sources in the named midwestern States are preventing the attainment or maintenance of the SO_2 or TSP" standards in the petitioning States. There is no inconsistency or conflict between the cited cases and the decision by the Court below. Petitioners failed not because the Agency or the Court below disagreed that § 126(b) is "the appropriate vehicle for considering the interstate impact if multiple sources" (Pet. Cert. at 13), but because the evidence did not support a finding of violation.

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[23] Those claims became moot while this case was pending in the Court of Appeals because of the revision of the TSP standards, and no party challenges the disposition of those claims.

CONCLUSION

For the foregoing reasons, this Court should deny the writ requested.

Respectfully submitted,

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December 22, 1988

ATTACHMENT 1

STATEMENT REQUIRED BY RULE 28.1

Allegheny Pittsburgh Coal Company
Allegheny Power Service Corporation
Allegheny Power System, Inc.
Allegheny Generating Company
American Electric Power Company
Appalachian Power Company
Centerior Energy Corporation
Cleveland Electric Illuminating Company
CMS Energy Corporation
Columbus Southern Power Co.
Commonwealth Edison Company
Consumers Power Company
Dayton Power & Light Company
Electric Energy, Inc.
Illinois Power Company
Illinois Power Finance Company N.V.
Illinois Power Fuel Company
Indiana Michigan Power Co.
Indiana-Kentucky Electric Corporation
Indianapolis Power & Light Company
IPALCO Enterprises, Inc.
Kentucky Power Company
Kentucky Utilities Company
Louisville Gas & Electric Company
Monongahela Power Company
Ohio Edison Company
Ohio Power Company
Ohio Valley Electric Corporation
Oxford Energy Company
Pennsylvania Power Company

PSI Holdings, Inc.
Public Service Company of Indiana, Inc.
Southern Indiana Gas & Electric Company
The Cincinnati Gas & Electric Company
The Potomac Edison Company
Toledo Edison Company
Union Light, Heat & Power Company
West Penn West Virginia Water Power Company
West Penn Power Company
West Virginia Power and Transmission Company

Supreme Court, U.S.
FILED
JAN 23 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-684

In the Supreme Court of the United States

OCTOBER TERM, 1988

STATE OF MAINE, ET AL., PETITIONERS

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

Under Section 110(a)(2)(E) of the Clean Air Act, 42 U.S.C. 7410(a)(2)(E), individual State plans for implementing the Act's air quality requirements must include provisions adequate to prohibit "any stationary source within the State from emitting any air pollutant in amounts which (I) will prevent attainment or maintenance by any other State of [a national air quality] standard, or (II) interfere with measures required to be included in the applicable implementation plan for any other State * * * to prevent significant deterioration of air quality or to protect visibility * * *." The questions presented are:

1. Whether Section 126(b) of the Clean Air Act, 42 U.S.C. 7426(b), which allows a State to petition the Environmental Protection Agency (EPA) "for a finding that any major source emits or would emit any air pollutant in violation of Section 110(a)(2)(E)(i)," requires EPA to review the adequacy of the existing state implementation plans of all States in which sources named in the petition are located to determine whether those sources are causing a violation of the Act's standards within the petitioning State.

2. Whether EPA acted arbitrarily and capriciously in denying the State of Maine's Section 126(b) petition.

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-684

STATE OF MAINE, ET AL., PETITIONERS

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A17) is reported at 852 F.2d 574.

JURISDICTION

The judgment of the court of appeals was entered on July 22, 1988 (Pet. App. C1-C2). The petition for a writ of certiorari was filed on October 20, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Clean Air Act, 42 U.S.C. 7401 *et seq.*, establishes a joint state and federal program to control the Nation's air pollution. The Act calls for the establishment and achievement of primary and secondary national am-

bient air quality standards (NAAQS). Primary standards are those necessary to protect public health with an adequate margin of safety (42 U.S.C. 7409(b)(1)); secondary standards are those necessary to protect the public welfare (42 U.S.C. 7409(b)(2)). Under the Act, the Environmental Protection Agency (EPA) is responsible for establishing both sets of standards (42 U.S.C. 7409), but then each State must adopt a plan providing for the "implementation, maintenance, and enforcement" of such standards within each air quality control region within the State (42 U.S.C. 7410(a)(1)). The state implementation plans (SIPs) must be prepared within nine months of EPA's promulgation or revision of a NAAQS and must specify emission limitations and other measures necessary to implement the standards, including control requirements for existing pollution sources (42 U.S.C. 7410(a)(2)(A)-(K)). EPA reviews all initial and revised SIPs to ensure that the Act's requirements are met (42 U.S.C. 7410(a)(2)-(3)), and EPA must itself promulgate a federal implementation plan for a State that fails to submit a SIP meeting the Act's requirements (42 U.S.C. 7410(c)).

Sections 110(a)(2)(E) and 126 of the Act are concerned with interstate air pollution. Section 110(a)(2)(E) requires that each SIP contain measures that prohibit a "stationary source within the State from emitting any air pollutant in amounts which will (I) prevent attainment or maintenance by any other State of any [NAAQS], or (II) interfere with measures required to be included in the applicable [SIP] for any other State under [the Act's provisions regarding protection of visibility on certain federal lands and the prevention of significant deterioration (PSD) in certain areas of high air quality]" (42 U.S.C. 7410(a)(2)(E)); see 42 U.S.C. 7470-7491 (PSD program)). Section 110(a)(2)(E) also requires that each SIP contain measures "insuring

compliance with the requirements of [Section 126 (42 U.S.C. 7426)]."

Section 126, in turn, establishes procedures for identifying and addressing the types of interstate air pollution proscribed by Section 110(a)(2)(E). SIPs must require that certain new sources notify nearby States of prospective interstate impacts before commencing construction (42 U.S.C. 7426(a)(1)); and States must identify existing sources that may have significantly contributed to violations of the ambient standards in other States and must have provided "nearby" States with the identity of such sources within three months of the enactment of the 1977 Clean Air Act Amendments (42 U.S.C. 7426(a)(2)).[1]

Section 126(b) establishes a procedural mechanism that allows States and other governmental entities to petition EPA for a finding that a "major source" [2] in another State is operating (or will operate) in violation of the substantive prohibitions contained in Section 110(a)(2)(E). 42 U.S.C. 7426(b). Under Section 126(b), EPA must convene a public hearing and render a decision within 60 days of receipt of a petition. Section 126(c) prohibits any new or modified source from being built or operated in violation of the Act's interstate requirements, and requires that existing sources found by EPA to be in violation either cease operations within three months or submit to a schedule designed to ensure compliance with control requirements that eliminate the impermissible interstate pollution as expeditiously as practicable.

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[1] Pub. L. No. 95-95, 91 Stat. 685.

[2] A "major stationary source" is defined in Section 302(j) to "mean any stationary facility or source of air pollutants which directly emits, or has the potential to emit, one hundred tons per year or more of any air pollutant * * * " (42 U.S.C. 7602(j)).

2. On December 19, 1980, petitioner Commonwealth of Pennsylvania petitioned EPA for relief pursuant to Section 126(b), claiming that sulfur dioxide (SO_2) emissions from 38 specific sources in West Virginia and Ohio were preventing attainment and maintenance of SO_2 NAAQS in four Pennsylvania counties (Pet. App. A6, B3). Pennsylvania subsequently amended its petition to allege that all major sources of SO_2 and particulate matter in a five-state region were responsible for violation of applicable NAAQS throughout Pennsylvania (*ibid.*). In December 1980 and in January 1981, respondent State of New York also petitioned EPA for relief pursuant to Section 126(b), asserting that the conversion into sulfate particulates of SO_2 emissions from 19 sources in a six-state region was preventing New York from complying with applicable particulate NAAQS (Pet. App. A6, B3-B4). New York also claimed that the emissions interfered with applicable visibility and PSD requirements (Pet. App. B3-B4). Finally, petitioner State of Maine filed a Section 126(b) petition in October 1981, alleging that sulfate particulates derived from SO_2 were interfering with its ability to comply with PSD and visibility requirements (Pet. App. A7, B4). Maine's petition sought relief from sources in seven midwestern States, without mentioning any emissions from Pennsylvania, New York or any of the other eight States located between Maine and the Midwest (*ibid.*).

On June 18 and 19, 1981, EPA held a public hearing on the petitions filed by Pennsylvania and New York and, following Maine's subsequent filing of its petition in October 1981, EPA consolidated all three petitions for its consideration (Pet. App. B4; 46 Fed. Reg. 55551 (1981)). The three States and more than 60 other parties filed written comments on the petitions with EPA, which on September 4, 1984, published its proposed disposition of

each of the petitions. See 49 Fed. Reg. 34851-34866 (see Pet. App. B5).

EPA proposed denial of Pennsylvania's petition on the ground that Pennsylvania had failed to establish the prerequisites to relief under Section 126(b) (Pet. App. B5-B8). EPA's proposed findings stated that Pennsylvania's evidence was insufficient to support its claim that out-of-state sources prevented attainment or maintenance of the SO_2 NAAQS in the three areas at issue (*id.* at B6).[3] Pennsylvania did not attempt to support its broader interstate pollution claim.

EPA also proposed denial of New York's petition, including its claim that sulfate particulates originating from out-of-state sources were contributing impermissibly to violations of particulate NAAQS in western New York (Pet. App. B5-B6, B7-B9). EPA based its proposed denial on, *inter alia,* its findings that sulfates from all sources were responsible for only a low percentage of particulate levels and that the claimed violations of the particulate standard were not reliably established (*id.* at B7-B8).

Finally, EPA proposed denial of Maine's petition (Pet. App. B5-B6, B7-B9). According to EPA's proposed findings, Maine's claims of "regional haze" fell outside the scope of Section 126(b) because Maine had not alleged that major sources located in other states were interfering with visibility protection measures contained within its SIP (Pet. App. B9). Maine's SIP did not include visibility measures then contained in federal regulations (*ibid.*).

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[3] EPA found that in one area the modeling study predicting violations (the Cramer study) was only preliminary in view of its reliance on emissions and meteorological data of uncertain accuracy; in the second area no violations were predicted; and in the final area a violation was predicted at only one small site and was primarily the product of in-state sources. See Pet. App. B6-B7.

Following a period of notice and comment on its proposed findings, EPA published its final decision on December 10, 1984. See 49 Fed. Reg. 48152-48157 (Pet. App. B1-B25). EPA denied each of the three petitions, concluding that each State had failed to demonstrate that out-of-state sources had contributed significantly to violations of NAAQS or visibility or PSD requirements within the petitioning State (Pet. App. B24).

3. Pursuant to Section 307 of the Clean Air Act, 42 U.S.C. 7607, petitioners and respondent New York petitioned the United States Court of Appeals for the District of Columbia Circuit for review of EPA's denial of the three Section 126(b) petitions. The court of appeals affirmed, but remanded New York's petition for further proceedings to allow New York to submit new data relevant to a new NAAQS for particulates promulgated by EPA in July 1987 (Pet. App. A1-A17).

The court of appeals rejected petitioners' contention that "the filing of their section 126(b) petitions immediately obliged EPA to take the investigatory steps necessary to determine whether the SIPS in all named upwind states were in compliance with § 110(a)(2)(E))" (Pet. App. A8). The court instead agreed with the EPA Administrator that "his responsibility to evaluate SIPs for compliance with § 110(a)(2)(E) is linked to his review of an otherwise required submission by a state" (Pet. App. A8). The court of appeals explained that EPA's construction was supported by the language of Section 126(b), which "focuses on 'major sources,' not the validity of a state's SIP" and which requires that "the Administrator take * * * action on a section 126(b) petition very quickly" (Pet. App. A9-A10). The court also found that the language of Section 110(a)(2), which "contains no language expressly directing the Administrator to reevaluate existing SIPs" likewise supports the Administrator's view (Pet. App. A9, A10).

"When Congress has intended to establish a requirement for direct EPA action," the court explained, "it has said so" (*id.* at A10).[4]

Finally, the court of appeals concluded that EPA had not acted arbitrarily and capriciously in denying any of the three petitions (Pet. App. A12-A16). The court agreed with EPA that "[b]ecause Maine's claims in this proceeding concern only the problem of regional haze, Maine has not presented any claim which falls within the ambit of § 126(b)" (Pet. App. A13). The court next reviewed EPA's assessment of the scientific evidence relied upon by Pennsylvania and concluded that the EPA had not acted unreasonably in finding that the evidence failed to show that out-of-state sources contributed significantly to violations of the Act's standards in Pennsylvania (Pet. App. A14-A15). Because, however, EPA had recently promulgated a new NAAQS for particulate matter relevant to New York's petition and did not object "to a remand for submission of new data rather than dismissal with leave to re-petition," the court remanded New York's petition for that limited purpose (Pet. App. A16).

Judge Ruth B. Ginsburg joined the court's opinion and also filed a separate opinion (Pet. App. A16-A17). The concurrence explained that "Congress, when it is so minded, is fully capable of instructing the EPA to address particular matters promptly" but "did not supply such direction in this instance * * *." *Ibid.*

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[4] The court also rejected petitioners' contention that Section 406(d)(2) of the 1977 Amendments created an independent duty for the Administrator to revise all existing SIPs. The court concluded that "§ 406(d)(2) only sets the timetable for actions to revise an SIP 'by reason of any amendment made by this Act' * * * [and] itself creates no independent obligation to revise an SIP" (Pet. App. A11).

ARGUMENT

1. The court of appeals correctly rejected petitioners' contention that EPA must investigate the adequacy of the SIP of each State named in a Section 126(b) petition in order to determine whether the SIP complies with Section 110(a)(2)(E) of the Act. Neither the relevant statutory language nor its legislative history supports petitioners' proffered construction; both instead support the reasonableness of EPA's contrary view.

Subsections 110(a)(1) and (3) require EPA to review initial State submissions and proposed SIP revisions to ensure their compliance with eleven specific requirements established by subsection (a)(2), including paragraph (E)'s interstate air pollution requirement. Section 110(a) does not, however, require EPA to initiate its own review of the adequacy of existing SIPs. Nor does the language of paragraph (E) itself suggest that EPA must undertake a "de novo" investigation of the adequacy of all existing SIPs to ascertain which, if any, are inconsistent with that paragraph's prohibition on interstate pollution.

As the court of appeals concluded (Pet. App. A10), moreover, Congress's failure to include such an express requirement in the 1977 Clean Air Act Amendments is particularly telling because in those same amendments, Congress explicitly directed the promulgation of EPA regulations addressing a variety of matters, including new source performance standards, noncompliance penalties, stack height credit, and visibility protection requirements. 42 U.S.C. 7411(f), 7420(a), 7423(c), 7491(a)(4). Congress also directed EPA in those same amendments to undertake other actions, including periodic reassessments of existing ambient standards and new source performance standards. 42 U.S.C. 7409(d)(1), 7411(b)(1)(B). Indeed, as the court of appeals recognized (Pet. App. A10-A11), Section

124 of the Act, which is entitled "Assurance of adequacy of State plans" and was added by the 1977 Amendments, expressly requires EPA to review the adequacy of existing SIPs with regard to dependence by major fuel burning sources on petroleum products and natural gas. 42 U.S.C. 7424. Hence, where Congress wanted EPA to review the adequacy of all existing SIPs, it clearly said so.

The language of Section 126 likewise supports the Administrator's position. Section 126(b) directs EPA to apply Section 110(a)(2)(E)'s prohibition of certain interstate air pollution, but nowhere intimates that doing so requires EPA to review all existing SIPs. It focuses on "major source[s]," not on the adequacy of a State's SIP, and simply requires EPA to conduct a public hearing on a petition and to either deny the petition or make a finding of impermissible interstate pollution "[w]ithin 60 days after receipt of [the] petition" (42 U.S.C. 7426(b)).[5]

Indeed, as the court of appeals explained (Pet. App. A9, A10 (citation omitted)), because Section 126(b) requires EPA to "take final action on a section 126(b) petition very quickly"—within 60 days of the petition's receipt—"[i]t is reasonable to conclude that Congress did not intend that the Administrator be required to perform all these duties in such a short period of time in the absence of the clearest expression." Under petitioner's reading of Section 126(b), however, "the Administrator would be required to engage in an entire array of investigative duties. In particular, the Administrator would be required to undertake a full-scale investigation of the adequacy of the SIPs of all states

[5] Because, moreover, Section 126 directs EPA to apply only Section 110(a)(2)(E)'s "prohibition," and does not provide that EPA must carry out any other requirement of that section, EPA would not have violated Section 126—the sole basis for petitioners' complaint—even if a court were to conclude (contrary to our submission) that Section 110(a)(2)(E) did require EPA to review all existing SIPs.

named in the petition for all pollutants involved, to conduct whatever data-gathering and research is necessary to either prove Petitioners' claims or affirmatively disprove their allegations, and to develop whatever new air pollution models are necessary to confirm or affirmatively disprove Petitioners' modeling theories, as well as conducting a public hearing, analyzing the evidence presented by all interested parties, proposing a determination, considering all comments submitted and promulgating a final rule—all within 60 days of receipt of the petition." Pet. App. A9-A10.[6]

Not surprisingly, the Act's legislative history likewise provides no support for petitioners' proffered construction. There is no general reference to any affirmative duty of the Administrator to review all existing SIPs for compliance with Section 110(a)(2)(E). Nor does the legislative history in any manner suggest that Section 126(b) imposes an affirmative duty upon EPA to review SIPs, to engage in an investigation, or to conduct additional studies before rendering a decision. It is simply not plausible to suppose that Congress, without any mention of it in the legislative history, intended to compel EPA either to undertake the massive task of reviewing all 55 existing SIPs for all six ambient standards or to complete within 60 days the kind of detailed investigation petitioners would require in response to every Section 126 petition.

Finally, there is no merit to petitioners' assertions (Pet. 11, 14) that EPA's construction effectively reads Section 110(a)(2)(E) out of the Clean Air Act. Section 110(a)(2)(E) remains a significant requirement under EPA's view. EPA's review of various SIP revisions submitted by States

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[6] As the court of appeals noted (Pet. App. A10 n.2), however, there is "the possibility of extension pursuant to section 307(d)(10), 42 U.S.C. 7607(d)(10)."

is an ongoing process and under EPA's construction Section 110(a)(2)(E)'s prohibition on interstate air pollution has to be satisfied for the Agency to approve of each revision. In addition, whenever a new NAAQS is promulgated or an existing NAAQS is revised, EPA must ensure that all SIPs and revised SIPs submitted for its review conform to Section 110(a)(2), including paragraph (E)'s prohibition. To be sure, petitioners believe that EPA's review for consistency with Section 110(a)(2)(E) should also be triggered by the filing of a Section 126 petition, but Congress made no provision for such additional review, which is why, as Judge Ruth B. Ginsburg advised (Pet. App. A17), "[t]he judiciary * * * is not the proper place in which to urge alteration of the Agency's course."

2. Contrary to petitioners' claim (Pet. 13-14), the court of appeals' decision does not conflict with the decision of any other court of appeals. In none of the cases upon which petitioners rely, did a court of appeals hold that EPA was required in a Section 126(b) proceeding to investigate the adequacy of the SIPs of all States with sources named by the petition. Indeed, in none of those cases was a court of appeals reviewing EPA's disposition of a Section 126(b) petition. Each case instead involved a challenge, rejected by the court of appeals, to EPA's approval of a revision in another State's SIP. The statements regarding Section 126 made by those courts in their respective opinions, moreover, express no more than the unremarkable proposition, not disputed by EPA or the court of appeals' ruling here, that Section 126(b) provides the proper vehicle for determining whether a "major source" or multiple "major sources" are causing interstate air pollution that contravenes Section 110(a)(2)(E)'s prohibition. See *New York* v. *EPA*, 716 F.2d 440, 445 (7th Cir. 1983); *New York* v. *EPA*, 710 F.2d 1200, 1205 (6th

Cir. 1983); *Connecticut* v. *EPA*, 656 F.2d 902, 907 (2d Cir. 1981).

3. Finally, there is likewise no merit to petitioners' contention that the court of appeals erred in upholding EPA's denial of Maine's petition (Pet. 12). The court of appeals correctly ruled that Maine had "failed to make even a threshold showing of entitlement under § 126(b)" (Pet. App. A13).

The gravamen of Maine's arguments before EPA was that regional haze resulting from pollution transported from midwestern states was impairing visibility at Acadia National Park, which is an area subject to the Clean Air Act's visibility protection requirements (see 42 U.S.C. 7491). See Pet. App. A12-A13. As the court of appeals explained (*id.* at A13), however, because Maine "d[id] not allege that major sources in any other states are interfering with visibility measures contained in its SIP—its SIP does not contain regional haze visibility measures[—]Maine has failed to make even a threshold showing of entitlement under § 126(b)." [7]

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[7] Maine's real complaint is that current EPA visibility protection regulations do not contain federally enforceable measures addressing regional haze (see Pet. 12). As the court of appeals held (Pet. A13 n.3), however, Section 126(b) does not provide litigants such as petitioners with a way to circumvent the Clean Air Act's established procedures for challenging such EPA action (or inaction). Petitioners tacitly concede as much in acknowledging that they have brought a wholly separate proceeding to test "[t]he legality of this regulatory delay" (see Pet. 13 n.8, citing *Maine* v. *Thomas*, 690 F. Supp. 1106 (D. Me. 1988), appeal pending, No. 88-1983 (1st Cir.)).

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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No. 88-684

In The

Supreme Court of the United States

October Term, 1988

STATE OF MAINE, COMMONWEALTH OF PENNSYLVANIA, STATE OF CONNECTICUT, STATE OF VERMONT, STATE OF NEW HAMPSHIRE, STATE OF NEW JERSEY, and RICHARD L. OTTINGER,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and LEE THOMAS, Administrator, CINCINNATI GAS & ELECTRIC COMPANY, et al., MONONGAHELA POWER COMPANY, NORTH AMERICAN COAL CORPORATION, et al., PEABODY HOLDING COMPANY, INC., et al., TENNESSEE VALLEY AUTHORITY,

Respondents.

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INTRODUCTION

Two significant arguments are presented in opposition to this Petition that were not presented to the Court below. First, the Federal Respondents dispute the petitioners' assertion that EPA has made the Clean Air Act's interstate air pollution provisions effectively meaningless, suggesting instead that those provisions are implemented through "an ongoing process" of SIP revisions. Second, Industry Respondents argue that EPA's disposition of the interstate petitions *does* constitute performance of the statutory duty claimed by the petitioners – to determine that the SIPs of upwind states comply with the interstate standard of § 110(a)(2)(E) – although not in so many words. Neither argument has merit.

1. EPA's Claim that the Interstate Pollution Provisions Are Implemented Whenever Air Quality Standards Are Adopted or Revised Is False.

The Government responds to the central legal assertion of the Petition – that EPA's construction of the Clean Air Act leaves the Act's interstate pollution control provisions virtually meaningless – by reciting three circumstances under which the Act's prohibition of excessive interstate pollution will be applied by EPA:

> EPA's review of various SIP revisions submitted by States is an ongoing process and under EPA's construction Section 110(a)(2)(E)'s prohibition on interstate air pollution has to be satisfied for the Agency to approve of each revision. In addition, whenever a new NAAQS is promulgated or an existing NAAQS is revised, EPA must ensure that all SIPs and revised SIPs submitted for its review conform to Section 110(a)(2), including paragraph (E)'s prohibition.

Brief of Federal Respondents, at 10-11. The first mechanism holds no promise for any but the most isolated, local cases of interstate pollution. As noted in the Petition at 12, EPA's determination that only *new* emissions need to be evaluated in the context of a SIP revision, rather than the combined effect of new and previously approved emissions, has been challenged and upheld in two Circuits.

The latter two means conceivably offer an opportunity to examine the cumulative effect of multiple emissions. But contrary to the Government's assertion, EPA has *not* required the States to demonstrate compliance with § 110(a)(2)(E) on any of three occasions since 1977 when the agency has adopted or revised a NAAQS. *See* 43 Fed. Reg. 46264 (Oct. 5, 1978) (new lead standard); 44 Fed. Reg. 8202 (Feb. 8, 1979) (revised ozone standards); and 52 Fed. Reg. 24672 (July 1, 1987) (revised particulate matter standards). The suggestion in the Government's brief of a gradual, but steady review by EPA of interstate pollution has no basis in the agency's own construction of the statute.

2. The Industry Respondents' Claim that Section 110(a)(2)(E) Compliance Has, *De Facto*, Been Found by EPA Highlights the Critical Deficiency in EPA's Application of Section 126.

The briefs of both groups of Industry Respondents oppose certiorari on the new theory that EPA has effectively already determined that SIPs of the upwind states *do* adequately *prevent* interstate pollution:

> [I]n the final analysis, EPA undertook precisely the inquiry that would have governed the review of the

> Midwestern SIPs for their conformity with § 110(a)(2)(E). * * * In these circumstances, even assuming *arguendo* that the § 126(b) petitions were sufficient to trigger review of the Midwestern state SIPs, EPA's failure to state *in haec verba* that those SIPs have adequate provisions to prevent violations of § 110(a)(2)(E) in the petitioning States was, at worst, harmless procedural error.

Brief of Respondents Cincinnati Gas and Electric Co., et al., at 14; *see also* Brief of Respondents Peabody Holding Company, Inc., et al., at 9-10. More extreme even than the position taken by EPA, which fails to implement § 110(a)(2)(E) but at least leaves the question of compliance unresolved, the Industry Respondents would put the issue to rest. But they do so only by standing § 110(a)(2) on its head. Rather than having the Administrator approve each SIP if he finds that it satisfies the statutory criteria, these Respondents obtain the same result if the Administrator merely finds that evidence submitted by downwind states in a remedial administrative proceeding is *insufficient* to prove the interstate criterion is *violated*.

This logical somersault lays bare the critical deficiency in EPA's application of § 126 to these petitions: its placement of the full burden of proof on the petitioning states to prove violations of § 110(a)(2)(E), even in the absence of any prior agency determination of compliance. Thus, contrary to Cincinnati Gas's footnote 21, the Administrator's allocation of the burden of proof is precisely the instrument by which the Act's provisions to control interstate pollution are eviscerated. Until the Administrator accepts the same oversight responsibility for interstate pollution that he exercises under § 110 for intrastate pollution, the interstate provisions of the Act will remain effectively meaningless.

CONCLUSION

For the foregoing reasons, and those stated in the Petition, certiorari should be granted in this case.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1988

STATE OF MAINE, ET AL., PETITIONERS

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

This brief is filed pursuant to Rule 22.6 of the Rules of this Court to respond to statements made in petitioners' reply brief that misstate the position taken by the federal respondents before both this Court and the courts below.

1. Contrary to petitioners' claim (Reply Br. 1), our opposition to their petition did not include an argument "not presented to the Court below." As the court of appeals' opinion makes clear, our brief before that court responded in similar fashion to petitioners' assertion that EPA's construction effectively reads Section 110(a)(2)(E) out of the Clean Air Act; in both submissions we referred to instances when EPA must determine that Section 110(a)(2)

(E)'s prohibition on interstate pollution has been satisfied. See Pet. App. A12 ("The Administrator's review of various SIP revisions submitted by states is an ongoing process, and under the Administrator's interpretation the prohibition of § 110(a)(2)(E) is one of the requirements that must be met before he can approve any initial SIP or revision."). On both occasions, moreover, we specifically argued that one such instance is when a State submits a SIP or revised SIP in response to EPA's promulgation of a new NAAQS or a revision to an existing NAAQS.[1] Compare Br. in Opp. 10-11 ("In addition, whenever a new NAAQS is promulgated or an existing NAAQS is revised, EPA must ensure that all SIPs submitted for its review conform to Section 110(a)(2), including paragraph (E)'s prohibition.") with Gov't C.A. Br. 63 ("Similarly, whenever a new NAAQS is promulgated or an existing NAAQS is revised, new State SIPS must be submitted, and the Administrator is to apply the elements of section 110(a)(2), including subsection (E).").

2. There is likewise no basis for petitioners' assertions that "EPA's claim that interstate pollution provisions are implemented whenever air quality standards are adopted or revised is false" or that the notion of "steady review by EPA of interstate pollution has no basis in the agency's construction of the statute" (Reply Br. 1, 2). The views expressed in our brief in opposition and in our court of appeals brief, which the court of appeals adopted, are longstanding.

The three instances cited by petitioners (Reply Br. 2) when EPA has adopted or revised a NAAQS are not to the

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[1] Section 110(a)(1) of the Clean Air Act requires each State to submit a SIP or revised SIP "within nine months after the promulgation of a [NAAQS] (or revision thereof) * * * for any air pollutant" (42 U.S.C. 7410(a)(1)).

contrary. None of those regulations purports to declare all of the applicable requirements of the Clean Air Act triggered by the new or revised standard; they describe only those supplemental requirements peculiar to the pollutant involved. See, *e.g.*, 43 Fed. Reg. 46264 (1978) (emphasis added) ("The regulations promulgated below, *together with the current requirements of 40 CFR Part 51,* set forth the requirements for States to follow in developing, adopting, and submitting acceptable implementation plans for the lead national ambient air quality standards."). Hence, the Act's general requirements for a SIP, including satisfaction of Section 110(a)(2)(E), apply. See 40 C.F.R. 51.110(e) ("The plan for each Region must have adequate provisions to ensure that stationary sources from within that Region will not: (1) prevent attainment and maintenance of any national standard in any portion of an interstate Region or any other Region * * *[;] (2) interfere with measures required to be included in the applicable implementation plan for any such Region to prevent significant deterioration of air quality or to protect visibility."); see also 48 Fed. Reg. 46,152, 46,163 (1983) (listing Section 110(a)(2)(E) as statutory basis for 40 C.F.R. 51.110(e)).[2]

3. Finally, petitioners ignore that EPA has in fact disapproved proposed SIP revisions because of interstate impacts. For example, EPA disapproved a portion of the Indiana SIP because of the State's failure to comply with Section 110(a)(2)(E) (48 Fed. Reg. 5106, 5107 (1983) (proposed disapproval); 53 Fed. Reg. 46,608, 46,612 (daily ed. Nov. 18, 1988) (final disapproval)); and, in disapproving a portion of the Illinois SIP, EPA relied, among other

[2] In the case of EPA's revision of the Clean Air Act's ozone standard, cited by petitioners (Reply Br. 2, citing 44 Fed. Reg. 8202 (1979)), EPA determined that no SIP revisions were required because the federal standard was being relaxed and "States may have more stringent controls than necessary if they choose" (44 Fed. Reg. 8203).

things, on possible interstate impacts (see 48 Fed. Reg. 5110, 5113 (1983) (proposed disapproval); 53 Fed. Reg. 40,415, 40,423-40,425 (1988) (final disapproval)).

For the foregoing reasons, and those stated in our brief in opposition, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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